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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 19

No. 618 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND, APPELLANT,

vs.

THE COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED JANUARY 9, 1929

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IN SUPREME COURT OF APPEALS

ORDER ALLOWING WRIT OF ERROR

Writ of error and supersedeas awarded. Bond $1,500.00. November 23, 1926.

IN CIRCUIT COURT OF ACCOMAC COUNTY

TRUST COMPANY OF NORFOLK, VIRGINIA, and THE SAFE Deposit and Trust Company of Baltimore, Maryland, Guardian and Trustees for L. J. & E. P. Kellam,

v.

COMMONWEALTH OF VIRGINIA

ORDER CORRECTING ASSESSMENTS—April 26, 1926

This day came the Trust Company of Norfolk, Norfolk, Virginia, by Hugh C. Davis, Esq., its attorney, and the Safe Deposit and Trust Company of Baltimore, Maryland, by George L. Doughty, Esq., its attorney, and L. J. & E. P. Kellam, infants, by Mrs. Carrie P. Kellam, their guardian and next friend, by George L. Doughty, Esq., her attorney, and moved the Court to exonerate them from the payment of State taxes assessed against the Trust Company of Nor-
[fol. 4] folk and the Safe Deposit and Trust Company of Baltimore, sometimes called the Safe Deposit Company of Maryland and sometimes called the Safe Deposit and Trust Company of Maryland, Guardian and Trustees of L. J. & E. P. Kellam, which said assessments were made for the years 1921, 1922 and 1923 on the 12th day of January, 1925, and for the year 1924 on the 10th day of January, 1925, and which assessments for the year 1925 were made on the personal property book 1925, which assessments with penalty and interest amount in the aggregate to the sum of $1,054.77.

And, thereupon, the said plaintiffs moved the Court to exonerate them from the payment of the said State taxes

amounting to $1,054.77, as aforesaid, which motions were defended by Jeff. F. Walter, Esq., Commonwealth's Attorney of Accomac County, and E. Warren Wall, Counsel for the State Tax Commission.

And, it appearing to the Court that all the assessments complained of were made within two years prior to September 1st, 1926, and that the intangible personal property so assessed is the personal property as the same may have been changed by reinvestment, assigned and delivered by L. J. Kellam who died August 9th, 1920, to the Safe Deposit and Trust Company of Baltimore, Maryland, under a deed [fol. 5] in trust bearing date the 4th day of May, 1920, and the evidence of which intangible personal property has been continuously in Baltimore in the possession and under the exclusive control of the said Safe Deposit and Trust Company, Trustee, since May 4th, 1920, and no part of said evidence of said property has been in the State of Virginia at any time since May 4th, 1920, and that the said L. J. Kellam, by a certain other deed in trust, dated the 3rd day of May, 1920, assigned and delivered to the Trust Company of Norfolk, Norfolk, Virginia, certain evidences of intangible personal property upon certain trusts therein set out and the said Trust Company of Norfolk has regularly reported and paid the taxes upon the said intangible personal property held by it under the deed in trust to it bearing date of May 3rd, 1920, and that there is no connection between the Safe Deposit and Trust Company of Baltimore and the Trust Company of Norfolk and that neither has any interest or control of the property so assigned and delivered to the other, and that neither the Trust Company of Norfolk nor the Safe Deposit and Trust Company of Baltimore has been appointed and qualified as Guardian of the said L. J. and E. P. Kellam in the State of Virginia or elsewhere, the duly qualified Guardian of L. J. and E. P. Kellam in the [fol. 6] State of Virginia being their mother, Carrie P. Kellam.

And, it further appearing to the Court that the said L. J. Kellam, deceased, was a resident of the Commonwealth of Virginia and the County of Accomac at the time of his decease; that the said L. J. Kellam, and E. P. Kellam, infant children of the said L. J. Kellam, deceased, are residents of Accomac County, Virginia, and that Mrs. Carrie

P. Kellam, mother of the said infants and their duly qualified guardian, is a resident of Accomac County, Virginia, all of which facts are contained in an agreed stipulation of fact filed in this case and hereby made a part of the record or were admitted by counsel in open Court, all of which the Court certified to be the facts proven in this case.

Whereupon, it is considered by the Court that the assessment of intangible personal property held by the Safe Deposit and Trust Company of Maryland, Trustee for L. J. and E. P. Kellam is erroneously assessed to the Trust Company of Norfolk, Trustee for L. J. and E. P. Kellam, it is ordered that such assessment be corrected and that the name of the Trust Company of Norfolk be eliminated therefrom.

But the Court being further of opinion that all such in- [fol. 7] tangible property held under the trust aforesaid by the Safe Deposit and Trust Company of Baltimore, Maryland, for L. J. and E. P. Kellam is properly assessable with taxes by the Commonwealth of Virginia in Accomac County, it is ordered that the assessment aforesaid be amended and corrected so that the names of the corporation and persons assessed with such taxes read as follows: The Safe Deposit and Trust Company of Baltimore, Maryland, trustee for L. J. and E. P. Kellam, and Carrie P. Kellam, guardian of L. J. and E. P. Kellam, to which action of the Court in correcting the assessment aforesaid by eliminating from said assessment the name of the Trust Company of Norfolk, Virginia, the Commonwealth, by her attorney, duly excepted and prayed that her exception be noted of record, which is accordingly done.

And, to which action of the Court in holding the said trust fund held by the Safe Deposit and Trust Company of Baltimore, Trustees for L. J. and E. P. Kellam to be taxable in Virginia in the manner and form as above stated to the said Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam and Mrs. Carrie P. Kellam, Guardian for L. J. and E. P. Kellam, and the [fol. 8] said L. J. and E. P. Kellam, the said plaintiffs, by their attorney, duly excepted and prayed that their exception be noted of record, which is accordingly done.

And the said plaintiffs having intimated their intention of applying to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to this order, it is ordered that the effect of this order be suspended for a period of ninety days, provided, however, that the said plaintiffs, or someone for them, shall give bond in the sum of two thousand dollars conditioned according to law with surety to be approved by the Clerk of this Court.

IN CIRCUIT COURT OF ACCOMAC COUNTY

AGREED STATEMENT OF FACTS—Filed April 26th, 1926

It is stipulated and agreed that the taxes for the years 1921, 1922, 1923, 1924 and 1925 against the Trust Company of Norfolk and the Safe Deposit and Trust Company of Baltimore, Maryland, sometimes called the Safe Deposit Company of Maryland, and sometimes called the Safe Deposit and Trust Company of Maryland, Guardian and Trustees, L. J. and E. P. Kellam, were all made within two [fol. 9] years prior to September 1, 1926; that the intangible personal property so assessed is the personal property, as the same may have changed by reinvestments, assigned and delivered by L. J. Kellam, who died August 9, 1920, to Safe Deposit and Trust Company of Baltimore under a deed of trust bearing date the 4th day of May, 1920, and the evidences of which intangible personal property have been continuously in Baltimore in the possession and under the exclusive control of the Safe Deposit and Trust Company of Baltimore, Trustee, since May 4, 1920, and no part of the evidences of property has been in the State of Virginia at any time since May 4, 1920; that the said L. J. Kellam, by a certain other deed dated the 3rd day of May, 1920, assigned and delivered to the Trust Company of Norfolk, Norfolk, Virginia, certain evidences of intangible personal property, upon certain trusts therein set out, and the said Trust Company of Norfolk has regularly reported and paid the taxes assessed upon the said intangible personal property held by it under the trust to it bearing date May 3, 1920; that copies of both of the said

trust deeds are filed herewith and made a part hereof; that there is no connection between the Safe Deposit and Trust Company of Baltimore and the Trust Company of Norfolk, and that neither has any interest or control in [fol. 10] the property so assigned and delivered to the other, and neither the Trust Company of Norfolk nor the Safe Deposit and Trust Company of Baltimore has been appointed and qualified as Guardian of L. J. and E. P. Kellam in the State of Virginia, or elsewhere, the duly qualified Guardian of L. J. and E. P. Kellam in the State of Virginia being their mother, Carrie P. Kellam. Without waiving her objection to the admissibility of the following statement upon the ground that in the opinion of the Commonwealth the same is irrelevant and immaterial, it is agreed that the Safe Deposit and Trust Company of Baltimore has under the laws of Maryland regularly reported to the taxing authorities of the City of Baltimore and the State of Maryland the said intangible property held by it under the trust aforesaid, bearing date May 4th, 1920, and regularly paid taxes assessed against said intangible property to the City of Baltimore and the State of Maryland.

Dated at Accomac, Virginia, this 21st day of April, 1926.

Trust Company of Norfolk, by Hugh C. Davis, Its Attorney. Commonwealth of Virginia, by E. [fol. 11] Warren Wall, Counsel State Tax Commission. Safe Deposit & Trust Company of Baltimore, by George L. Doughty, Its Attorney. Jeff F. Walter, Attorney for the Commonwealth, Accomac County, Virginia.

EXHIBIT TO AGREED FACTS

Copy of Deed in Trust Filed April 26th, 1926

Know all men by these presents that I, Lucius J. Kellam of Belle Haven, Virginia, in consideration of my love and affection for my children, hereinafter named, and in further consideration of the sum of One Dollar and of the assumption by the Safe Deposit and Trust Company of Baltimore of the trusts herein declared, do hereby transfer and

deliver unto the said Safe Deposit and Trust Company of Baltimore for the uses and trust purposes hereinafter declared, the securities enumerated on the schedule hereto attached and made part hereof.

[fol. 12] To be held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said pricipal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to [fol. 13] the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held. If as said children arrive at twenty-five years of age, I shall be then living, then and in that event I reserve to myself the right to postpone the delivery to them of their share of said trust funds, principal and income provided I shall, prior to the delivery thereof, notify said Trustee to postpone such delivery, and provided also that I shall have the right, and which said right I hereby reserve, to revoke this trust in whole or in part at any time before the delivery of the principal and accumulations to my said children or either of them and in that event said Trustee shall reconvey with [illegible] accumulations as I may demand, and thereupon the [illegible]t hereby created shall cease to the extent of the pro[illegible] so reconveyed to me; and I

reserve to myself also the right to alter and change the trusts hereby created.

Power is hereby conferred upon said Trustee to vary and change the investments hereof as often as it may deem best and full power is conferred upon it to invest said accumulations. In my lifetime said Trustee shall make no change in any of the investments now turned over to it, [fol. 14] without my written approval.

To facilitate the transfer of registered securities, said Trustee is authorized to have the same registered in its name solely.

Witness my Hand and Seal this 4th day of May in the year nineteen hundred and twenty and the corporate seal and signature of the Vice-President of the said Trust Company to evidence its receipt of said securities and the acceptance by it of the trusts herein stipulated.

In duplicate.

Lucius J. Kellam. (Seal.) Safe Deposit & Trust Company of Baltimore, by Fred W. Marshall, Vice-President.

Test: George L. Doughty, Jr.
Attest: —— Gibson, Secretary.

EXHIBIT TO AGREED FACTS

Schedule of Securities Transferred to Safe Deposit and Trust Company of Baltimore, Trustee under Deed of Trust from Lucius J. Kellam Dated May 4, 1920

[fol. 15]

$2,000 Amer. Tel. & Telegraph Co. 6% conv. Gold Bonds due Aug. 1, 1925, Nos. 9631 and 11831 with Aug., 1920, etc. coupons attached.

2,000 Interborough Rapid Transit Co. secured conv. 7% gold Notes due Sept. 1, 1921, Nos. M22467/8 with Sept., 1920, etc. coupons attached.

5,000 Green Star Steamship Corp. 7% Equip. skg. fund 1st mortgage bonds due Dec. 1, 1924, Nos. T1842/1846 (temp. cfts.) no coupons attached.

1,000 Midland Timber Co. collateral trust serial 6% gold bond due Jan. 20, 1922, No. 298 with July 20, 1920, etc. coupons attached.

1,000 Davidson Sulphur & Phosphate Co. 1st mtge. 6% gold skg. fund bond due 1927 No. 2363 with Sept., 1920, etc. coupons attached.

1,000 Cosden & Co. conv. skg. fund 6% bond due 1932 No. 3963 Ser. "A" with July, 1920, etc. coupons attached.

1,000 E. P. Burton Lumber Co. 1st mtge. 6% gold bond due Feb. 1, 1922, No. 95 with Aug. 1, 1920, etc. coupons attached.

[fol. 16]

7,000 West India Sugar Finance Corp. sec. skg. fund 7% gold bonds due June 15, 1929, Nos. M3288, M3290, M3292/6, with June, 1920, etc. coupons attached also one subscription warrant for new securities which may be issued attached to each $1,000 bond.

$4,000 United States of America 2nd Liberty Loan 4¼% bonds due 1942 Nos. 14376/9 ex. May 15, 1920 coupons.

500 United States of America 3rd Liberty Loan 4¼% bonds due 1928 Nos. 661443 no coupons on bond.

500 United States of America 4th Liberty Loan 4¼% bond due 1938 No. 639904 with Oct. 15, 1920, coupons.

10 shares Columbia Graphaphone Mfg. Co. pfd. Stock. (Delaware Co.)

50 shares The Jones & Lamb Co. prior preference shares.

100 " Manufacturers Finance Co. pfd.

14 " Baltimore Tube Co. Inc. pfd.

15 " United States Fidelity & Guaranty Co.

10 " W. H. McElwain Co. 1st pfd.

20 " The Blumberg Bros. Co. 1st pfd.

[fol. 17]

200 " Pennsylvania Railroad Co.

" " Cosden & Co. conv. skg. fund 6% gold bond due 1932, No. 2025 ser.

1,000 "B" with July, 1920, etc. coupons attached.

L. J. Kellam.

(Copy of Deed of Trust to Trust Company of Norfolk Omitted.)

STATEMENT AS TO BOARD

The bond required by the order entered April 26th, 1926, herein was duly executed on the 28th day of June, 1926, by Safe Deposit and Trust Company of Baltimore, Trustee under deed of trust from Lucius J. Kellam, and Carrie P. Kellam, Guardian for L. J. and E. P. Kellam, principals, and Carrie P. Kellam and George L. Doughty, sureties, before the Clerk of the Circuit Court for the County of Accomac, the said sureties being deemed sufficient by the said Clerk.

John D. Grant, Jr., Clerk.

[fols. 18 & 19] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 20] IN SPECIAL COURT OF APPEALS

TRUST COMPANY OF NORFOLK, VIRGINIA, et als.

v.

COMMONWEALTH OF VIRGINIA

Circuit Court of Accomac County

OPINION BY JUDGE BEVERLEY T. CRUMP, PRESIDENT

Richmond, Va., March 1, 1928.

On May 4th, 1920, Lucius J. Kellam domiciled in Virginia, and a resident of Accomac county, executed an instrument in the form of a deed of trust, to the Safe Deposit and Trust Company of Baltimore, Maryland, by which he settled upon his two sons as beneficiaries certain securities valued at approximately $50,000.00, and listed in a schedule attached to the deed. The securities, consisting of stocks and bonds, were delivered to the trustee, and the deed provided that insofar as they were registered, the trustee was authorized to have them registered in its name, in order to

facilitate transfers for reinvestment or in the course of the execution of the trust.

The trustee was directed to collect the income upon the corpus of the property, and after paying to itself 5% commissions on the gross income and paying such taxes "as may be chargeable" on the property, the trust fund and the income were to be held upon trusts, which may be sum- [fol. 21] marized thus:

(1) The income was to be allowed to accumulate and so become a part of the corpus, until the two sons of the assignor, Lucius J. Kellam, Jr., then eight years of age and Emerson Polk Kellam, then five years old, should respectively attain the age of twenty-five years.

(2) When the older son reached the age of twenty-five years one-half of the entire fund then on hand, original principal and accumulations, was to be delivered to him as his property. As the younger son attained the same age the balance of the entire fund should be delivered to him.

(3) If either of said two sons should die before receiving his share, leaving children living at his death, then his share was to be paid over and delivered to the children; otherwise if the one so dying left no children living at his death, his share of the fund should accrue to the survivor, who would thereupon become entitled to the entire fund when he became twenty-five years of age.

(4) The maker of the deed of trust reserved to himself the right to alter, or to cancel and invalidate, the entire [fol. 22] trust provision in these further stipulations:

"If as said children arrive at twenty-five years of age, I shall be then living, then and in that event I reserve to myself the right to postpone the delivery to them of their share of said trust funds, principal and income provided I shall, prior to the delivery thereof, notify said trustee to postpone such delivery, and provided also that I shall have the right, and which said right I hereby reserve, to revoke this trust in whole or in part at any time before the delivery of the principal and accumulations to my said children or either of them and in that event said trustee shall reconvey to me such part or the whole of the estate hereby conveyed with its accumulations as I may demand, and

thereupon the trust hereby created shall cease to the extent of the property so reconveyed to me; and I reserve to myself also the right to alter and change the trusts hereby created."

The donor further retains his control of the fund by having the deed provide that "in my lifetime said trustee shall make no change in any of the investments now turned over to it, without my written approvel;" although full power had been conferred upon the trustee to change the investments as their judgment might dictate.

[fol. 23] The non-resident trustee signed the deed, accepted the trust, and the securities have been at all times since in its possession in the city of Baltimore.

Mr. Kellam, the grantor in the deed, died at his residence in Accomac county August 9, 1920, three months after the trust was created.

The trustee in Baltimore regularly reported the intangible personal property constituting the trust fund to the taxing authorities in Maryland, and paid the State and city taxes there assessed against it.

In the year 1925 the trust fund was assessed for taxation in Virginia by the assessors in Accomac county for the years 1921, 1922, 1923 and 1924 and placed upon the books for 1925, the assessments for these years, with penalties and interest, amounting to $1,054.77.

In April 1926 the Baltimore trustee applied to the Circuit Court for a correction of these assessments, and insisted that the fund held by it was not taxable in Virginia. The court held that the fund was taxable in this State and ordered it to be assessed against "The Safe Deposit and [fol. 24] Trust Company of Baltimore, Maryland, trustee for L. J. and E. P. Kellam, and Carrie P. Kellam, guardian of L. J. and E. P. Kellam." Mrs. Kellam had qualified as guardian of the two children upon the death of her husband. Upon the petition of the trustee and of the guardian a writ of error was allowed.

Objection is made on behalf of the Commonwealth, to the consideration by this court of an agreed statement of facts and copies of two deeds found in the record, because they are not identified by the trial judge in a bill of exceptions, or otherwise.

The order of the court refers to the agreed statement of facts and in express terms files it as part of the record. The agreed statement of facts recites as to two deeds of trust "that copies of both of the said trust deeds are filed herewith and made a part hereof;" one of these deeds was the deed of trust in question. The order further recites that the plaintiffs in error duly excepted to the adverse ruling of the court. These papers were necessarily made a part of the record by the order of the court, and no bill of exception was necessary. The function of a bill of exceptions is to put into a record something which does not appear in the court proceedings to have been made part of the record.
[fol. 25] The question to be decided is whether the corpus of the trust fund is taxable in Virginia, and if so to whom it should be assessed.

The applicable statute is section 2307 of the Code of Virginia as amended in 1920 and in 1922. It is there provided that if property consists of bonds and stocks in any county or city other than that of the owner's residence, or in a State other than Virginia, it shall be listed by and taxed to the owner, thus fixing the situs of such intangible property for the purpose of assessing the tax.

As to whom it should be assessed and taxed, this statute provides: "If property be owned by a person sui juris, it shall be listed by and taxed to him. If property be owned by a minor, it shall be listed to and taxed by his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has; if he has no guardian nor trustee, father nor mother, it shall be listed by and taxed to the person in possession." It is then provided that in case of a trust for an adult or a married woman, the property shall be assessed to the trustee if "any they have in this State"; otherwise it shall be [fol. 26] listed to the persons themselves. There is no requirement that in a case of a non-resident trustee for a minor, the property may not be assessed to the trustee.

The proper construction, and the true meaning and effect of the deed, presents no great difficulty.

The complete power and control retained by the grantor over the corpus and income of the trust fund during his life time constituted the instrument a mere recov-able expression of his intention as to the disposition of the prop-

erty upon his death, if the disposition made by him was not recalled before that event occurred. So long as that situation remained the entire trust fund was unquestionably taxable in Accomac county as the property of Mr. Kellam. The actual disposition of the property under the provisions of the deed could not take effect, if at all, except upon his death. His death having ocurred, without his having altered or revoked the deed, as a transfer intended to take effect in enjoyment after the donor's death. In Bullen v. State of Wisconsin, 240 U. S. 625, a resident of Wisconsin, by a deed of trust settlement quite similar to the deed in the instant case, transferred to a Chicago trust company a large fund invested in bonds, stocks, and notes, [fol. 27] and it was held that upon his death the corpus of the trust fund was subject to the inheritance or succession tax of Wisconsin. The court decided that the absolute power of control over all the gifts, evidenced by the right of entire revocation reserved by the donor, continued the ownership of the intangibles in the donor with the owner's dominion power of disposition.

The donor here having died without altering or revoking the deed, the gifts passed to the beneficiaries in accordance with the provisions of the deed, and they acquired such equitable estates as the deed conferred upon them.

In Carter v. Keesling, 130 Va. 655 real and personal property was given by a testator to his son, with a provision that if the son and daughter of his son should both die without issue, then the property should revert to the testator's other children. It was there held that the estate vested in the son was a defeasible fee in the real estate and a defeasible absolute estate in the personal property. In the instant case the two children took a defeasible absolute estate in this personal property, in equal shares except as varied by the difference in their ages, with the right of survivorship between them, defeasible as to each of them [fol. 28] upon dying before reaching twenty-five years of age without issue. There is no provision in the deed in terms covering the event that both beneficiaries should die under twenty-five and without issue. Whether the fund in such event would revert to the estate of the donor, or would pass to the estate of the survivor it is unnecessary now to determine.

The reported cases in Virginia show that it has been the policy of the State to impose taxes upon all intangible property, the ownership of which is traceable to a citizen or citizens of Virginia.

It has been repeatedly held that when a citizen and resident of this State has an equitable life estate in intangible personal property held in trust by a non-resident trustee or otherwise enjoys the usufruct of the property, the State can levy a tax upon the corpus of the fund, even though the fund has never been in Virginia. Brooklyn Trust Co. v. Booker, Com'r., 122 Va. 680; Wise, Trustee, v. Commonwealth, 122 Va. 693; and Elliott v. Commonwealth, 132 Va. 136.

Though the tax is assessed in the name of the trustee, the burden is in reality imposed upon the beneficial owner, [fol. 29] a resident of the Commonwealth who enjoys the protection of its laws along with other cotizens, and ought in fairness to contribute a due proportion of revenue for the support of the government. Selden v. Brooke, 104 Va. 832; and Elliott v. Commonwealth, supra.

It is insisted for the plaintiff in error that these cases are to be distinguished from the instant case, because in those cases the life tenant was actually determined and was in receipt of an annual income from the fund. The court, in these prior cases, however, declares the corpus of the fund to be taxable in Virginia, and not merely the interest of the life tenant nor the income. The person who was receiving the income was naturally the owner to whom the property should be assessed and who should pay the tax upon the corpus of the property. In the instant case the beneficiaries have no life estate merely; they have an absolute estate though there is a possibility of its subsequent defeasance and though the enjoyment of the estate in possession is postponed.

But without dwelling upon these features of the case, the actual situation is this—Mr. Kellam was the owner of the securities and the fund was taxable in Virginia as his property, during his life time. If his death did not effect a trans- [fol. 30] fer of the ownership for taxable purposes to his two sons, then his ownership was projected beyond his death, and the title and equitable right to the prop-rty passed to his personal representative until the two sons

became respectively twenty-five years of age. In that event the fund would be taxable in Virginia as part of Kellam's estate, certainly for the period mentioned.

The endeavor to adapt the ancient maxim mobili sequnter personam to intangible personal property, with reference to its situs for taxation, has produced great variety and some contrariety of opinion in this country, with its forty eight separate jurisdictions, and its great wealth of credit investments. We need not enter upon this limitless field of discussion.

We are satisfied that the intangibles in questions could not be relieved of taxation in Virginia by their removal to Baltimore and being put in the temporary possession of the trustee there for the purposes expressed in the trust deed. The material enquiry here is to whom they should be assessed and by whom the tax should be paid, and the answer should be consonant with fairness and in harmony with out tax laws. If an adult life tenant is in actual perception of the annuau income, it is a matter of indifference [fol. 31] to him whether the trustee pays the tax and deducts it from the income, or whether the life tenant pays it after receiving the gross income—as was said in Elliott v. Commonwealth, supra.

By reason of the postponement of the actual possession and use of the fund on the part of the beneficiaries under the trust provisions until they became twenty-five years of age, nothing comes into their hands during the intervening period out of which they should pay the tax. We see no reason why, in the case of these infant beneficiaries, the tax on intangibles should not be assessed to and paid by the trustee, who is under a duty to pay "such taxes as may be chargeable" on the property, though the trustee is non-resident. Under the statute the property may, in case of minors, be listed to the guardian or trustee; though in the case of an adult person or married woman it can only be listed to a resident trustee. In Wise v. Commonwealth, supra, the trust property held by a non-resident trustee was assessed to him and this assessment was upheld; since that decision however the statute has been changed so as to require the property to be assessed to the beneficiary, if not a minor, in such a case. In Taylor v. [fol. 32] Commonwealth, 124 Va. 445, intangibles owned

by a minor in Virginia were assessed at the residence of the minor against a non-resident guardian. The statute involved in that case, in so far as it relate to minors, was identical with section 2307, hereinbefore transcribed. It is apparent in the instant case that the assessment to the non-resident trustee will provide the more convenient and just method of taxing these intangibles, and will throw no obstacle in the way of collecting the tax.

The record in the case discloses that on May 3rd, 1920, Mr. Kellam executed a deed of trust to the Trust Company of Norfolk, Norfolk, Virginia, for the benefit of his two sons, quite similar though not identical with the deed to the Baltimore Company. This deed transferred to the trustee another separate list of securities $50,000.00 or more in value. These securities had been assessed against the Norfolk Trust Company and the tax paid by it regularly each year. When the securities in the possession of the Baltimore trustee were assessed for the first time in 1925, they were assessed against both trust companies jointly. For this reason the Norfolk company joined with the Baltimore company in the application to be exonerated from the payment of the tax.

[fol. 33] In the order entered by the trial court the facts relative to both deeds are recited, as also the qualification of Mrs. Kellam as the guardian, and the judgment of the court is stated as follows:

"Whereupon, it is considered by the court that the assessment of intangible personal property held by the Safe Deposit and Trust Company of Maryland, Trustee for L. J. and E. P. Kellam is erroneously assessed to the Trust Company of Norfolk, Trustee for L. J. and E. P. Kellam, it is ordered that such assessment be corrected and that the name of the Trust Company of Norfolk be eliminated therefrom.

"But the court being further of opinion that all such intangible property held under the trust aforesaid by the Safe Deposit and Trust Company of Baltimore, Maryland, for L. J. and E. P. Kellam is properly assessable with taxes by the Commonwealth of Virginia in Accomac county, it is ordered that the Assessment aforesaid be amended and corrected so that the names of the corporation and persons assessed with such taxes read as follows: The Safe

Deposit and Trust Company of Baltimore, Maryland, trustee for L. J. and E. P. Kellam, and Carrie P. Kellam, guar-
[fol. 34] dian of L. J. and E. P. Kellam."

In our opinion the court correctly ordered the name of the Norfolk company to be eliminated from the assessment of the Baltimore trust fund. While there is a liability to the Commonwealth for the payment of taxes in the aggregate on all the intangible personal property owned by these minors, there is no reason why separate assessments should not be made upon two funds under such severance of the two funds from the general property as appears here. In Taylor v. Commonwealth, supra, the court says:

"Further: Where the owner is a minor, idiot or lunatic, he is of course incompetent to list for taxation property owned by him, and alike incompetent to act as a payer of taxes. Hence, the statute in all such cases provides for some one else than the owner of the property to list it for taxation and to whom it shall be taxed. To provide a competent person to list the property for taxation and also to act as payer of the taxes thereon, who will be a person competent to give a correct list and one who, if not the owner, will be charged with a responsibility to the property owner in the premises, were, we think, the objects and purposes of the statute in designating by whom
[fol. 35] property of such persons is to be listed and to whom taxed, and not the making of the domicile of the former person the situs of the property for taxation."

In Wise v. Commonwealth, supra, the trust fund there in question was assessed separately against the non-resident trustee.

As a general rule the tax assessors should be left to act according to the circumstances in listing intangibles, especially of minors, as they can doubtless best judge of what comports with justice, convenience and practicability in assessing the tax at the situs and in the collection of the tax; unless constrained by statute.

In the second sentence from the extract of the order above transcribed, the court, having eliminated the Norfolk company, directs the assessment to be made in the

name of the Baltimore company and of the guardian jointly. The property should of course be assessed in Accomac county as the father and both sons resided there, but as the guardian had no control over the fund, and no portion of it nor of its usufruct could come into the possession of the guardian during the minority of her wards, it is not essential that she should be charged with the assess-
[fols. 36 & 37] ment and payment of the tax. Our opinion is that it should not be so assessed. It should rather be assessed against the trustee, under the peculiar circumstances here, who has laid upon it a direct obligation to pay all taxes chargeable upon the property.

The order of the trial court will therefore be amended by striking out from the concluding words of the second sentence, in the extract from the order, viz: "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam, and Carrie P. Kellam guardian of L. J. and E. P. Kellam," the words "and Carrie P. Kellam guardian of L. J. and E. P. Kellam." The assessment will thus remain against the Baltimore trust company, as trustee for the named beneficiaries of the trust.

As so amended the judgment is affirmed, with costs against the plaintiff in error.

Judgment amended and affirmed.

[fol. 38] In Special Court of Appeals of Virginia

[Title omitted.]

Petition for Rehearing

To the Honorable the Judges of the Special Court of Appeals of Virginia:

The petition of Safe Deposit & Trust Company of Baltimore, Maryland, a Corporation (hereinafter called Petitioner) prays that your Honours may allow it, the Petitioner, a rehearing in the above entitled matter, and for grounds of its prayer represents unto your Honours:

Since your Honours' decision was rendered on March 1, 1928, Petitioner has been advised that the tax involved in this case is subject to a further objection in that it is in-

consistent with the 14th Amendment to the United States Constitution and amounts to a deprivation of property without due process of law. This, though a matter of grave importance, involving substantial rights incommensurate with the pecuniary stake, yet does not appear from the record and briefs in this case ever to have been brought to the attention of the Trial Court, nor to have been urged before your Honours. Petitioner is advised and believes [fol. 39] that constitutional questions of the sort are of sufficient gravity, in order that justice may be done and the rights of the citizen defined, to merit presentation, argument and consideration, although tardily raised. Petitioner therefore prays that it may be reheard and that the question whether or not it has been deprived of property without due process of law may receive an express determination at your Honours' hands.

Other reasons leading Petitioner to ask for a rehearing will be urged hereinafter.

Question Presented

Where the corpus of a fund (consisting of securities) created by the deed of trust of a domiciled citizen and resident of Virginia, since deceased, is held by a non-resident Trustee upon trust to manage, to accumulate, not distribute, the income, and to pay one-half of the principal, including accumulated income, to each of the grantor's two sons upon his reaching the age of twenty-five, but, if either of the said sons die before receiving his share, to pay the same to his issue him surviving, or, if he leave no issue him surviving, then to add his said share to the original share of the surviv- [fol. 40] ing brother and to hold it for him in precisely the same manner as such original share, and neither of the grantor's said sons has died or attained the age of 25, has such corpus, so created and held, a taxable situs in Virginia within the sanction of Section One of the 14th Amendment to the Constitution of the United States?

Position of Petitioner

Asserting that the corpus of a fund so created and held has no taxable situs in Virginia, Petitioner questions and denies the validity of Section 2307 of Code of Virginia of

1919 (as amended) upon the ground that the said statute as interpreted in this case by the Circuit Court for the County of Accomac and the Special Court of Appeals of Virginia is repugnant to the Constitution of the United States, and more especially to section one of the Fourteenth Amendment thereto, and, furthermore, petitioner specially sets up and claims that by the imposition of the tax complained of it is denied a right, title, immunity, and privilege pertaining to it under the Constitution of the United [fol. 41] States and more especially under the amendment and section aforesaid, and is deprived of its property without due process of law.

(Counsel's Statement of Facts and Argument omitted.)

Petitioner therefore prays that it may be granted a rehearing in this matter, that the prayers of this, its petition, may be allowed and that the assessment against it may be ordered to be stricken from the books as unconstitutional and invalid and that, failing this, the 1921 assessment may be declared illegal as contrary to the statute of this Commonwealth in such case made and provided.

And petitioner will ever pray, etc.

Safe Deposit & Trust Company of Baltimore, Maryland, Petitioner, by Counsel. Leake & Buford, Littleton M. Wickham, and Wm. Pepper Constable, Counsel for Petitioner.

[fols. 42 & 43] In Special Court of Appeals of Virginia

[Title omitted]

Order Allowing Rehearing—May 26, 1928

On mature consideration of the petition of the plaintiff in error to set aside the decree entered herein on the 1st day of March, 1928, and grant a rehearing, the prayer of said petition is granted. It is therefore adjudged and ordered that the said decree be set aside and annulled, and this cause is ordered to be placed on the privileged docket to be heard at the next term of this court.

Which is ordered to be certified of the circuit court of Accomac county.

A copy. Teste:

H. Stewart Jones, C. C.

[fol. 44] IN SPECIAL COURT OF APPEALS

[Title omitted]

On Rehearing

OPINION BY JUDGE BEVERLEY T. CRUMP, PRESIDENT

October 30, 1928

A rehearing of the decision rendered in this case, on March 1, 1928, was allowed by the court upon the petition of the Safe Deposit and Trust Company of Baltimore, Maryland, trustee in the deed out of which the controversy arose. The application for rehearing was based chiefly upon the contention of this trustee that the ruling of the court allowing the State a right to assess a tax upon the corpus of the personal property in question rendered the Virginia statute, under which the assessment was made, repugnant to the Constitution of the United States and therefore void. Although no such constitutional question was brought to the attention of the court, and was therefore neither argued nor considered, upon the original hearing, the court is of opinion that we should consider and determine a question of such gravity, though raised for the first time in a petition for rehearing. The reargument was confined largely to the presentation of the views of the respective parties upon the [fol. 45] constitutional question involved. It was insisted by the trustee that the Virginia statute, as interpreted by the court, was violative of the provisions of section one of the Fourteenth Amendment, in that the imposition of the tax complained of was a denial of and abridged the privileges and immunities of the parties in interest, and deprived them of their property without due process of law. In support of these claims learned counsel maintained, as stated in their brief, the following propositions:

"(a) That a State, under 14th Amendment, can tax only that property of which it has jurisdiction,

"(b) That it has jurisdiction only of such property as is within its borders,

"(c) That the only theory upon which personal property, which, or the evidence of which, is physically situated without the State, can be held to be within its jurisdiction is that embodied in the Maxim, mobilia sequuntur personam.

"(d) That the rule is one of convenience merely, based upon the owner's presumed dominion over and enjoyment of the property, and embodies a legal fiction which yields to the facts of the case, and,

[fol. 46] "(e) That inasmuch as this fiction has so yielded in the case of tangible property generally, and also in the case of intangible property held by a non-resident trustee for a resident beneficiary who, although in reception of the income therefrom, has no control or dominion over the fund (this being true from the point of view both of property and succession taxation), therefore, a multo fortiori must it yield when the resident cestuis que trustent have neither possession, control nor the usufruct but have merely a contingent and future interest in the intangible property so held for them."

The assertions so made under (a) and (b) embody correct general principles of law. The positions assumed in (c) and (d) rest upon too broad a basis. It is a rule too generally acknowledged in our law of taxation to admit of doubt, that intangible personal property is and should be taxed to the owner or owners legal or equitable, although the written evidence of the chose in action, where such exists, is in another State. The maxim mobilia sequuntur personam is the firmly maintained governing principle by which the right of the State of the owner's domicile to levy the tax upon intangible personal property is to be [fol. 47] judged. While some of the cases, in dwelling upon the origination of the application of the maxim in this country, speak of it as one of convenience merely, and as embodying a legal fiction which may yield to the facts of the case, these observations are usually found in a line of cases defining the doctrine of business situs of intangible

property, where for example funds or securities are placed in the hands of an agent in another State for permanent use in a business, requiring their constant change and the absolute control of the agent over them; a doctrine with which we are not concerned here, and which is an acknowledged deviation from the general rule.

Discussion of the question of the situs of intangibles for taxation may be taken as now precluded by the decision of the Supreme Court of the United States in the case of Blodgett v. Silberman, (April, 1928), 48 Sup. Ct. Rep. 410, where the court says:

"At common law the maxim 'mobilia sequuntur personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writ- [fol. 48] ing or otherwise and whether the papers evidencing the same are found in the State of the domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

"Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personalty has such a situs at the domicil of its owner that its transfer on his death may be taxed there."

We cannot agree with either the premises or the conclusion appearing in the petitioner's proposition (e). The maxim above mentioned by the Supreme Court of the United States does not yield in the case of intangible personal property in which a resident beneficiary has solely a life estate or other partial interest in the corpus of a fund, but it does not apply because the corpus of the fund is not owned by residents of the State imposing the tax, and has never in any sense been within the jurisdiction of the taxing State.

[fol. 49] In the recent case of Brooke v. City of Norfolk, 48 Sup. Ct. Rep. p. 422, which apparently was decided at the same time the opinion in Blodgett v. Silberman, supra, was handed down, the court, in quite a brief opinion, passed upon this question, with no reference to the maxim. It was shown in that case that a resident of Maryland, by his will probated in Baltimore, bequeathed in trust to a Baltimore trust company a large fund the income upon which was to be paid to a resident of Virginia, and which was to go to certain persons, none of whom were residents of Virginia, at the death of the life tenant. The donor and all persons in interest, except the receiver of the income for life, were non-residents of Virginia, and no part of the trust property was or ever had been in Virginia. The State of Virginia required the person receiving the income for life to pay a tax upon the entire corpus of the foreign trust fund, although she paid the tax upon the income derived from this source. The court says:

"But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole * * *.

"But here the property is not within the State, does not belong to the petitioner and is not within her possession or [fol. 50] control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See Wachovia Bank & Trust Company v. Doughton, 272 U. S. 567."

The case of Wachovia Bank & Trust Company v. Doughton, referred to by the court as authority involved the validity of an inheritance or succession tax, but the decision was based upon the fact that the property passing in succession did not belong to the deceased life tenant and was never within the jurisdiction of the taxing State. A resident of Massachusetts by his will probated at his domicile in that State bequeathed to a trust company in the State a fund to be held in trust, the income to be paid to his daughter so long as she should live and at her death to be transferred to such persons as she should appoint by her will, with further provision in case of failure of such appointment. The daughter subsequently married and became a resident of North Carolina and by her will probated in the latter State exercised the power of appointment. North Carolina un-

der her law imposed a succession tax upon the value of the property passing to the appointees. It was held by the Supreme Court that the power of appointment was derived from the will of the donor and the right to its exercise fol-
[fol. 51] lowed only from the disposition of the property made in the Massachusetts will; that the assets of the trust estate had never been in North Carolina, and had no situs actual or constructive in that State: "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor (the daughter) happened to have her domicil. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control." The imposition of the succession tax was declared invalid.

On the other hand it is held in the case of a trust settlement by deed in which the donor reserves the right to revoke the trust during his life time, as in the instant case, the domiciliary State of the donor may impose a succession tax upon the trust fund on the death of the donor, as the establishment of the trust then becomes irrevocable, although the trustee holding possession of the intangibles constituting the trust fund is not a resident of the State in which the donor and beneficiaries are domiciled. Bullen v. Wisconsin, 240 U. S. 625; Saltonstall v. Saltonstall, 48 Sup. Ct. Rep. 225.

[fol. 52] In the latter case the court says:

"The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax."

The ownership and situs of the fund was necessarily in the domiciliary State of the donor and the beneficiaries, for purposes of taxation, pursuant to the maxim mobilia sequuntur personam, although the intangibles were in the possession of a foreign trustee, who held full legal title to them.

These recent cases establish indubitably that the fixed doctrine in the federal jurisdiction, by which we are governed in discussing a constitutional question, is that intangible personal property retains its situs for taxation at the domicil of the owner, although the physical evidence of the chose in action may be removed to another jurisdiction, and that when the situs and ownership of a fund consisting of intangibles are found to be in a certain State, another State does not acquire jurisdiction to tax the fund from the fact that a person enjoying the income for life [fol. 53] from the fund, is or becomes a resident of the other State.

These cases suggest and render material certain enquiries as to the facts of the instant case. Are there, in the instant case, any non-resident owners of the corpus of the trust fund, in remainder or otherwise? Does the assessment here require any persons to pay a tax upon property or an interest in property, to which they are strangers? Whose property is taken without due process of law? Are the owners of the trust fund in this case resident in Virginia?

The donor Kellam, domiciled in Virginia and a resident of Accomack county, desired to provide for the future of his two sons, after they should become respectively twenty-five years of age, and to that end determined to settle upon them in equal shares one hundred thousand dollars in securities, with the direction that the income should not be distributed but be allowed to accumulate. To accomplish this purpose he executed the two trust deeds in the record, one to the Norfolk Company in Virginia, the other to the Baltimore Company, assigning to the trustee in each deed securities approximately fifty thousand dollars in value. Under the terms of each deed one half of the trust fund [fol. 54] and its accumulated income was to be delivered to each of the beneficiaries as they became twenty-five years of age, with the proviso that if either of the sons should die unmarried and without issue prior to attaining the age mentioned the interest of that son should accrue to the survivor. Owing to the fact that the deeds stipulated that the donor reserved the right to revoke the trust and gifts, these deeds—as held in the Bullen case—only operated as transfers of the gift upon the death of the donor; the equitable ownership remained in the donor as long as he

lived, and hence a succession tax could be assessed against the corpus of the fund at his death. The securities passing to the Norfolk company were delivered to it, those passing to the Baltimore company were likewise delivered and removed to Baltimore. These transfers took place in Virginia. In the latter instance the situs of the intangible personalty was not changed by the removal of the physical evidences of the intangibles to another State. Each deed provided that the trustee should out of the income pay the taxes chargeable upon the fund. The securities in the Baltimore Company deed were assessable and taxable in Virginia as well as those transferred to the Norfolk company as trustee, as long as the donor lived. Doubtless if the donor had lived [fol. 55] for twenty years subsequent to these transactions, the trustee in Baltimore would have paid the tax in Virginia each year. Unfortunately he died three months after the execution of the two deeds of trust. Did his death result in any material change in the situation, other than making finally operative the gift provisions of the two deeds? It created no non-resident owners. There remained still the sole fact that the legal title to, and physical evidences of, the securities were with the Baltimore trustee. This is by no means determinative of the lack of jurisdiction in Virginia to tax the fund. In Blodgett v. Silberman, supra, the question was raised whether bonds and certificates of indebtedness of the United States, payable to bearer, deposited in a safe deposit box in New York City, and never removed from there, owned by the decedent at the time of his death, were intangibles coming within the rule of mobilia sequuntur personam. The argument was made that such bonds, transferable from hand to hand, had lost their character as choses in action, and had taken on the character of physical property. This argument was held unsound by the learned Chief Justice delivering the opinion, as follows:

"The question here is whether bonds, unlike other choses in action, may have a situs different from the owner's domi- [fol. 56] cil such as will render their transfer taxable in the State of that situs and in only that State. We think bonds are not thus distinguishable from other choses in action. It is not enough to show that the written or printed evidence of ownership may, by the law of the State in

which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so treated, they are nevertheless in their essence only evidences of debt. The Supreme Court of Errors expressly admits that they are choses in action. Whatever incidental qualities may be added by usage of business or by statutory provision this characteristic remains and shows itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative and not the thing itself."

It can scarcely be maintained that the assessment of the trust fund here requires any one to pay a tax upon property, to which they are strangers, as that expression is used in Brooke v. Norfolk, supra; and hence without due process of law. It is argued that the estate given the two sons is merely a contingent interest in the property, and as such not taxable. It is certainly not technically con- [fol. 57] tingent. The proper construction of the deed is that it confers an absolute gift upon the two beneficiaries, subject to be divested upon a condition subsequent. If the deed be construed so as to require the trust to terminate in the event of the happening of the condition, that is, should both sons die without issue before attaining the age of the twenty-five, then there is a reversion to the estate of the donor. By analogy to the law of real estate the possible reversion is purely contingent, the prior gift to the sons vested. 1 Minor on Real Property, sections 171, 819.

It is urged in argument that the two sons are not owners of the property assessed for taxation, within the true meaning of the taxing statute. This presents a practical question rather than a legal one, in the instant case. The two sons are residents of Virginia, and administration upon the donor's estate could only take place in Virginia. Unless the two sons are owners, or in conjunction with the personal representative of the donor's estate they constitute the owners, then this fund has no ownership, and we have this large fund without any owner and existing in a non-taxable vacuum, until it is ascertained whether the condition subsequent is met. It is sometimes said that the law abhors a vacuum. Certainly we should not recognize [fol. 58] such a resultant situation here.

The court is of opinion that no non-residents are owners or have any interest in the corpus of the trust fund in Baltimore; that the present, and if essential, the ultimate owners of the property are residents of the State of Virginia; that the assessment in this case does not require any persons to pay a tax upon intangible personal property to which they are strangers.

We are further of opinion that both the owners and the *situs* of the intangibles in question have at all times been and still are within the jurisdiction of the State of Virginia, and therefore the assessment made in this case is not in any way violative of or repugnant to the 14th Amendment to the Constitution of the United States. The real problem is, how the property should be assessed, and who should be required to pay the tax. In the judgment rendered by the court this was solved by directing the trustee, who has temporary possession of the securities, to pay the tax, just as is now being done by the Norfolk trustee. This is in accordance with the terms of each of the deeds, and it seems to the court that this method carries out the original intention of the donor and is reasonably in conformity with the provisions of the statutes of Vir-
[fol. 59] ginia.

It is further insisted that the tax for the year 1921 should in any event be stricken out as invalid, because the failure to ascertain the lack of assessment for that year did not occur within three years prior to the time the assessment was made in January, 1925, in accordance with section 2332 of the Code. No such question was raised before the lower court; no assignment of error was made in this respect; and the record does not contain sufficient facts to enable this court to pass upon it intelligently. Therefore we cannot consider it.

For these reasons the court is constrained to adhere to the conclusions heretofore reached and to the judgment entered by the court thereon; and it will be so ordered.

Judgment affirmed.

[fol. 60] IN SPECIAL COURT OF APPEALS OF VIRGINIA

[Title omitted]

JUDGMENT—Oct. 30, 1928

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from. It is therefore adjudged, ordered and decreed that the said decree be affirmed, and that the appellants pay to the appellee thirty dollars damages, and also her costs by her expended about her defence herein.

[fol. 61] IN SPECIAL COURT OF APPEALS OF VIRGINIA

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERROR, AND PRAYER FOR REVERSAL

Petition for Appeal

To the Honourable the President of the Special Court of Appeals of Virginia:

Considering itself aggrieved by the final decision of the Special Court of Appeals of the Commonwealth of Virginia in the above entitled cause, the plaintiff therein, Safe Deposit and Trust Company of Baltimore, Maryland, hereby prays that an order be entered herein allowing it an appeal from the said final decision of the said Special Court of Appeals of Virginia to this Court and fixing the amount of the bond on said appeal.

Assignment of Error

And the said Safe Deposit and Trust Company of Baltimore, Maryland, assigns the following error in the record and proceedings in the said cause:

The said Special Court of Appeals of Virginia erred in so interpreting Chapter 104 of the Acts of Assembly of Virginia of 1923 (a copy of the pertinent provisions of which is attached hereto, marked "Exhibit A", and is to be taken and read as a part hereof) as to sustain its [fol. 62] validity and the validity of various taxes assessed thereunder by the Commonwealth of Virginia against the said Safe Deposit and Trust Company of Baltimore, Maryland, (a resident of the State of Maryland and a non-resident of the said Commonwealth of Virginia) upon the corpus of a fund (consisting of certain securities) created by an irrevocable deed of trust, the grantor in which, since deceased, was a domiciled citizen and resident of Virginia, and held by the said Safe Deposit and Trust Company of Baltimore, Maryland, upon trust to manage, invest and reinvest the same, to accumulate and not distribute the income therefrom, and to pay one-half the principal of the said fund and one-half the accumulated income to each of the grantor's two sons upon his reaching the age of twenty-five years, but, if either of the said sons should die before attaining such age, to pay his share to his issue him surviving, or, if he should leave no issue him surviving, then to add his said share to the original share of the surviving brother and to hold it for him in precisely the same manner as such original share, the said taxes being so assessed and imposed while neither of the grantor's said sons had died or attained the age of twenty-five years; and in so holding and deciding the said Special Court of Appeals of Virginia erred for the reason that the statute above cited, interpreted as aforesaid, is invalid and is repugnant to Section One of the Fourteenth Amendment of the Constitution of the United States in that the taxes assessed by virtue of the said statute deprive the said Safe Deposit and Trust Company of Baltimore, Maryland, of its property without due process of law.

Prayer for Reversal

For which error the said Safe Deposit and Trust Company of Baltimore, Maryland, prays that the said judgment of the Special Court of Appeals of Virginia dated the 30th day of October, 1928, in the above entitled cause, be reversed and a judgment rendered in favor of the said Safe

Deposit and Trust Company of Baltimore, Maryland, and for costs.

(Signed) Leake & Buford, William Pepper Constable, Littleton M. Wickham, Counsel for Safe Deposit and Trust Company of Baltimore, Maryland.

[fol. 63] Exhibit "A"

Chap. 104—An Act to Amend and Re-enact Section 2307 of the Code of Virginia, as Heretofore Amended

Approved March 26, 1923

1. Be it enacted by the general assembly of Virginia, That section twenty-three hundred and seven of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 2307. By whom property is to be listed; to whom taxed.—If property be owned by a person sui juris, it shall be listed and taxed to him. If property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has; if he has no father, then it shall be listed by and taxed to his mother, if any he has; and if he has no guardian, nor trustee, father nor mother, it shall be listed by and taxed to the person in possession. If the property is the separate property of a person over twenty-one years of age or a married woman, it shall be listed by and taxed to the trustee, if any they have in this State; and if they have no trustee in this State, it shall be listed by and taxed to themselves. In either case, it shall be listed and taxed in the county or city where they reside; but if they be non-residents of Virginia, the property shall be listed and taxed in the county or city wherein such trustee resides. If the property be the estate of a deceased person, it shall be listed by the personal representative or person in possession, and taxed to the estate of such deceased person. * * * If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county or city of his residence (except as hereinbefore provided) * * *

If the property consist of money, bonds, stocks, or other evidences of public or private debts in any county or city other than that of his residence, or State other than Virginia, it shall be listed by and taxed to the owner thereof; and it shall be the duty of the respective examiners of records of the several judicial circuits where the respective fiduciaries are appointed or qualified, to report to the respective commissioners of the revenues of the counties or cities in which said property is liable for taxation, all property held by said fiduciaries, to be taxed as provided by law. If the property be listed by and taxed to any person other than the owner, it shall not be delivered to the owner until [fol. 63a] the taxes thereon are paid or indemnity given to the person in possession, for the payment thereof.

[fol. 64] In Special Court of Appeals of Virginia

[Title omitted]

Order Allowing Appeal and Supersedeas

The Appellant in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from a judgment entered herein by the Special Court of Appeals of the Commonwealth of Virginia on the 30th day of October, 1928, and from each and every part thereof, and having on this 15th day of December, 1928, presented and filed its petition for appeal, assignment of error and prayer for reversal pursuant to the Statutes and the Rules of the Supreme Court of the United States in such case made and provided.

It is now here ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the Special Court of Appeals of the Commonwealth of Virginia in the above entitled cause as provided by law and, further, that the Clerk of the said Special Court of Appeals shall prepare and certify a transcript of the record proceedings and judgments in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in the said Court within 30 days from the date hereof.

And it is further ordered that upon the giving by the Appellant, or some one for it, of a bond in the sum of Fifteen Hundred dollars ($15,000.00) as security for damages and costs, with surety to be approved by the Clerk of the [fol. 65] said Special Court of Appeals, the mandate of the said Special Court of Appeals shall be stayed until final judgment be rendered on this appeal, unless the Appellant shall fail to perfect its appeal within 30 days from the date hereof.

Dated this 15th day of December, 1928.

Beverley T. Crump, President Special Court of Appeals of Virginia.

[fol. 66] Bond on appeal for $1,500, approved and filed December 15, 1928, omitted in printing.

[fol. 67] Citation, in usual form, showing service on Leon M. Bazile, omitted in printing.

[fol. 68] In Special Court of Appeals of Virginia

[Title omitted]

Stipulation as to Contents of Transcript of Record

It is stipulated and agreed by and between counsel for the Appellant and counsel for the Appellee that in preparing the transcript of the Record for transmission to the Supreme Court of the United States, the Clerk of the Special Court of Appeals of Virginia shall include in the said transcript the following:

(a) The Record in the Circuit Court for the County of Accomac, but omitting therefrom from and including the words "Copy of Trust Deed" on page 21 of the printed Brief and Petition for Writ of Error through and including the words "A. W. Brock, Secretary" on page 24 of said printed Brief and Petition, and substituting for such

omitted matter the words (Copy of Deed of Trust to Trust Company of Norfolk Omitted);

(b) The Petition of Appellant for a Writ of Error to the Circuit Court for the said County, but omitting therefrom from and including the words "Important Facts" on page 1 of the said printed Brief and Petition through and including the words "at the age of twenty-five years" on page 13 thereof, and substituting for such omitted matter the words (Counsel's Statement of Facts and Argument omitted).

(c) The Petition of Appellant for Rehearing in the Special Court of Appeals of Virginia but omitting therefrom from and including the word "Argument" on page 4 [fol. 69] of the said Petition through and including the words "opportunity to appeal" on page 47 thereof, and substituting for such omitted matter the words (Counsel's Statement of Facts and Argument omitted);

(d) All orders and opinions of the Special Court of Appeals of Virginia herein entered;

(e) Appellant's Petition for Appeal, Assignment of Errors, and Prayer for Reversal;

(f) Order allowing Appeal;

(g) Appeal and Supersed-as Bond;

(h) This Stipulation.

It is further stipulated and agreed, but without any admission on the part of the Appellant of the relevancy of the fact, that the beneficiaries under the deed of trust of which the copy is omitted under (a) above, and their interests under the said deed, are identical with those under the deed of trust to Appellant.

Signed this 14th day of December, 1928.

Leake & Buford, Littleton M. Wickham, Counsel for Appellant. Leon M. Bazile, Assistant Attorney-General; W. W. Martin, Counsel for Department of Taxation, Counsel for Appellee.

[fol. 70] Triplicate certificate omitted in printing.

[fol. 71] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Jan. 9, 1929

Comes now the Appellant and adopts its Assignment of Error, with the exhibit thereto attached, as its statement of the points to be relied upon.

Come now also Appellant and Appellee by counsel and represent that the whole of the Record, as filed, is necessary for the consideration of the case except as follows:

Title of paper	Record page
Petition for Appeal and Certificate	1 and 2
Orders of course of Special Court of Appeals	19, 37, 43

Joseph M. Hurt, Jr., Leake & Buford, William Pepper Constable, Littleton M. Wickham, Counsel for Appellant. Leon M. Bazile, Assistant Attorney-General; W. W. Martin, Counsel for Department of Taxation, Counsel for Appellee.

[fols. 72 & 73] Service of the above with full effect as if made by the United States Marshal, accepted this 8th day of January, 1929.

Leon M. Bazile, Assistant Attorney General; W. W. Martin, Counsel for Department of Taxation, Counsel for Appellee.

Endorsed on cover: File No. 33,927. Virginia Special Court of Appeals. Term No. 618. Safe Deposit and Trust Company of Baltimore, Maryland, appellant, vs. The Commonwealth of Virginia. Filed January 9th, 1929. File No. 33,927.

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STATEMENT AS TO JURISDICTION ON APPEAL WITH ACKNOWLEDGMENT OF SERVICE.

Supreme Court of the United States

OCTOBER TERM, 1928.

No. ~~[illegible]~~ 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT,

vs.

THE COMMONWEALTH OF VIRGINIA. APPELLEE.

APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOS. M. HURT, JR.,
Counsel for Appellant.

(33,927)

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 618.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT,

v.

THE COMMONWEALTH OF VIRGINIA. APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

May it please the Court:

The Appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Act, Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 937, (U. S. C., Tit. 28, Judicial Code and Judiciary, sec. 344, par. [a]).

Act, Jan. 31, 1928, c. 14, sec. 1, 45 Stat. ; Act. Apr. 26, 1928, c. 440, 45 Stat. , (U. S. C., Tit. 28, Judicial Code & Judiciary, secs. 861-1 and 861-2).

B.

(*All references are to the pages of the printed record.*)

The judgment sought to be reviewed was rendered on the 30th day of October, 1928, *vide* Transcript of Record, pp. 21 and 30.

Appellant's Petition for appeal was presented to the President of the Special Court of Appeals of Virginia on the 15th day of December, 1928, *vide* Transcript of Record, page 33.

C.

The statute quoted on pages 32 and 33 of the Record is the general assessment law for this Commonwealth. As summarized in the first opinion of the Lower Court (Record, p. 12) the last section quoted fixes the *situs* for taxation of stocks and bonds in any state other than Virginia; while the earlier portion of the quotation determines to whom, amongst various classes of owners or their fiduciaries, the property shall be assessed and taxed. The provision regarding *situs*, spoken of above, is as follows:

> "If the property consists of money, bonds, stocks, or other evidences of public or private debts in any * * * State other than Virginia, it shall be listed by and taxed to the owner thereof."

Thus much for the applicable statute. The facts are as follows: the property consists of various stocks

and bonds (Record, pp. 7, 8) as the same may have been changed by reinvestment by Appellant and the evidences of such property have been continuously in the possession of the Appellant and without this Commonwealth since the inception of the trust (Record, p. 4). The jural relationship of Appellant's *cestuis que trustent* to the said property is wholly defined and controlled by the terms of their father's trust deed, set out in the Record on page 5, *et seq.*, the pertinent provisions of which are as follows:

> "To Be Held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

The dates given in the foregoing quotation make it plain that both *cestuis* are yet under age, and reference to pp. 6 and 7 of the Record will show that the trust became irrevocable upon their father's death.

In its Petition for Rehearing the Appellant expressly raised the point that as interpreted in this case by the Special Court of Appeals the statute was repugnant to the due process clause of the 14th Amendment of the Constitution of the United States (Record, pp. 19, 20), and the rehearing was granted in order that the question might be determined (Record, p. 21). The decision was adverse to Appellant (Record, p. 30), it being held (Record, p. 29) that the assessment was in no wise unconstitutional.

Appellant therefore contends that if the word "owner", appearing in the foregoing quotation from the statute be correctly interpreted to include persons in the position of Appellant's *cestuis* with regard to the property involved (and that it *is* correctly so interpreted is the decision of the lower Court in this case, then under the facts of this case the statute is repugnant to the Constitution as aforesaid, and it, and the assessment made in accordance with it, are, *quoad hoc,* unconstitutional and void.

D.

The following decisions of this Court are believed to sustain jurisdiction of this Appeal.

Dahnke-Walker Co. v. *Bondurant* (1921), 257 U. S. 282, 288.

Cudahy Packing Co. Etc. v. *Parramore* (1923), 263 U. S. 418, 422.

Fiske v. *State of Kansas* (1926), 274 U. S. 380, 385.

It is therefore respectfully submitted that this Court has jurisdiction of this Appeal.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOS. M. HURT, JR.,
Counsel for Appellant.

ACKNOWLEDGMENT OF SERVICE.

Service of the foregoing Statement as to Jurisdiction on Appeal, with full effect as if made by a Marshal of the United States, is accepted this 1st day of February, 1929.

LEON M. BAZILE,
Assistant Attorney-General.
W. W. MARTIN,
Counsel for Department
of Taxation.
Counsel for Appellee.

FILE COPY

FEB 23 1
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. ~~[illegible]~~ 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT-PETITIONER,

vs.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT OF PETITION.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOSEPH M. HURT, JR.,
Counsel for Petitioner.

(33,927)

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 618.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT-PETITIONER,

vs.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of Safe Deposit and Trust Company of Baltimore, Maryland, Appellant in the above styled cause, the same having been duly docketed on January 9th, 1929, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

These proceedings arise out of an attempt on the part of Virginia to assess for taxation certain intangible

property held in Maryland. The only estate in the said property belonging to citizens or residents of Virginia is particular and contingent and carries with it no present enjoyment, no certain right of future enjoyment, and no possession or control of the *corpus*.

The assessment is therefore a bare proposition to tax an interest to which there is no citizen of Virginia who is not a stranger.

The facts are as follows:

On May 4th, 1920, one Lucius J. Kellam, domiciled and residing in Virginia (R. 3), executed a deed of trust (R. 5) by which he transferred to Petitioner certain securities, listed in a schedule attached to the deed (R. 7), and valued at approximately $50,000.00. The said securities were accordingly delivered to Petitioner, and were accepted, and are held by it at its place of business in Baltimore upon the following trusts (R. 6):

> "To be held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by

said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

No provision is made for the event of the death of *both* sons under twenty-five, without issue.

There is reserved to the grantor a full right of revocation. Power is given the Petitioner to cause the securities to be registered in its own name to facilitate reinvestment; but it is required to obtain the grantor's approval before making any change (R. 6 & 7).

Three months after executing this instrument, Kellam died; the trust remaining unrevoked (R. 2, 4). His two sons continue to reside in Accomac County, Virginia (R. 3).

Except insofar as they may have been changed by reinvestment, the securities have remained in Petitioner's possession in Baltimore (R. 4), where they have been regularly listed for taxation, and all state and city taxes paid (R. 5).

The Commonwealth of Virginia having also assessed state taxes against the property, Petitioner applied for relief to the Circuit Court for Accomac County (R. 1). At this time neither of the grantor's sons had died or attained the age of twenty-five years (R. 1, 2, 6). The

application was refused, the court holding the *corpus* taxable in Virginia (R. 3), and the assessment consequently proper.

The assessments of the same property against Trust Company of Norfolk (a Virginia corporation) stricken out by the Circuit Court (R. 3), and against Carrie P. Kellam, mother and guardian of the two children, stricken out by the Special Court of Appeals in its first opinion on appeal from the Circuit Court (R. 18) are immaterial to the question now before your Honors.

Petitioner having appealed as aforesaid to the Special Court of Appeals of Virginia, which was the highest court in which a decision might be had, the judgment of the Accomac Court, that Petitioner must pay the state taxes assessed against it on the property, was affirmed (R. 18) on March 1st, 1928.

Petitioner then applied for and obtained a rehearing. It was granted (R. 20) on the stated ground (R. 21) that the constitutional point expressly raised in the petition (R. 19, 20), was of sufficient gravity to warrant judicial consideration although raised for the first time on rehearing. On October 30th, 1928, the Special Court delivered its second opinion (R. 21), deciding the constitutional question adversely to Petitioner (R. 29).

On December 15th, 1928, an appeal was allowed Petitioner to the Supreme Court of the United States (R. 33), where the case was docketed on January 9th, 1929.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Neither Petitioner's *cestuis que trustent* nor any one else residing and domiciled in the State of Virginia

owns or has any control over the *corpus* of the trust fund hereinabove described or has any present, or any certain future, right of ever enjoying the same.

2. The fund has therefore no taxable *situs* in Virginia.

3. The assessment against the said fund is therefore unconstitutional and void in that it deprives Petitioner of its property without due process of law.

4. In holding to the contrary the Special Court of Appeals of Virginia has decided a federal question of substance in a way not in accord with the applicable decisions of the Supreme Court of the United States.

WHEREFORE your Petitioner prays that the papers, wherein an appeal was heretofore allowed to this Court from the judgment of the Special Court of Appeals of Virginia in a case entitled on its docket, Safe Deposit & Trust Company of Baltimore, Maryland, Appellant, v. Commonwealth of Virginia, Appellee, be regarded and acted on a petition for certiorari and as if duly presented to this Court at the time the said appeal was allowed, that a writ of certiorari be issued out of and under the seal of this Court directed to the said Special Court of Appeals of Virginia and that the judgment of the said Court may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your Petitioner will ever pray, etc.

SAFE DEPOSIT AND TRUST COMPANY
OF BALTIMORE, MARYLAND,

By:

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOSEPH M. HURT, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT-PETITIONER,

vs.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The first opinion of the Special Court of Appeals of Virginia (R. 9), was rendered on March 1st, 1928, and will not, it is believed, be officially reported, having been superseded by—

The final opinion of the said Special Court of Appeals (R. 21) rendered on rehearing on October 30th, 1928, and not yet officially reported. It is to be found in 145 S. E. 326, and will doubtless appear in 151 Va. under the style of *Trust Company of Norfolk, et al., v. Commonwealth.*

II.

JURISDICTION.

1. Acts, February 13, 1925, c. 229, sec. 1 (b), (c), 43 Stat. 938, (U. S. C., Tit. 28, Judicial Code and Judiciary, sec. 344, par. [b] & [c]).

2. The judgment sought to be reviewed was rendered on October 30th, 1928 (R. 21, 30).

Appellant-Petitioner's petition for an appeal to this Court was presented to, and allowed by, the President of the Special Court of Appeals of Virginia on December 15th, 1928 (R. 33, 34), and the case was docketed January 9th, 1929.

3. *First,* as to the time of raising the constitutional question:

Petitioner's right, title, immunity and privilege were specially set up and claimed in its petition to the Special Court of Appeals for rehearing (R. 19, 20). The question was considered by the Court (R. 21)—the highest in which a decision might be had—and was decided by it adversely to Petitioner's contention (R. 29, 30).

Second, as to the nature of the case:

Petitioner as trustee under the Kellam deed (R. 6) holds at its place of business in Maryland (R. 4) the physical evidences of the intangible property (R. 7) sought to be taxed by the State of Virginia. The said *corpus* has therefore no taxable *situs* in Virginia unless by virtue of the residence within her borders of the owner or owners thereof. But neither Petitioner's *cestuis que trustent,* nor their issue (unborn), nor any person who may take in default of the said *cestuis* or of their issue (unborn) "own" that *corpus,* since such persons have neither possession nor control thereof, nor, indeed, have they a present right, nor any certain future

right, to the usufruct (R. 5-7). The tax is imposed therefore on a *corpus* (R. 3) over which the State of Virginia has no jurisdiction and is consequently in contravention of the 14th Amendment of the United States Constitution. Petitioner, therefore, being deprived of its property without due process of law, was by the judgment sought to be reviewed (R. 21-30) denied a right, title, immunity and privilege pertaining to it by virtue of section One of the said Fourteenth Amendment.

4. *First*, as to the time of raising the constitutional question:

Sullivan v. *Texas*, 207 U. S. 416, 422;
Bowe v. *Scott*, 233 U. S. 658, 663;
Grannis v. *Ordean*, 234 U. S. 385, 392.

Second, as to the nature of the case:

Brooke v. *Norfolk*, 277 U. S. 27.

III.

STATEMENT OF THE CASE.

(In the interest of brevity the statement of the case set out under A of the accompanying Petition is not repeated here except by reference.)

IV.

SPECIFICATION OF ERRORS.

1. The Special Court of Appeals of Virginia erred in holding that the residence within that State of persons, bearing to the intangibles held by Petitioner such jural relationship as is created by the deed of trust here involved, was sufficient under the due process clause of

the Federal Constitution to create in Virginia a taxable *situs* for the said property, the physical evidences thereof being held in Maryland.

2. The Special Court of Appeals of Virginia consequently erred in holding that the said assessment (and the tax imposed thereunder) was constitutional and valid.

V.

ARGUMENT.

SUMMARY.

A. There is No Ownership in Virginia Commensurate with the (Absolute) Estate Actually Taxed.

B. There is No Valid Distinction Between the Case at Bar and the BROOKE Case.

C. The Ownership of Petitioner's Cestuis Cannot of Itself Create Jurisdiction.

A.

THERE IS NO OWNERSHIP IN VIRGINIA COMMENSURATE WITH THE (ABSOLUTE) ESTATE ACTUALLY TAXED.

In this case the Commonwealth of Virginia has assessed a tax against the whole of the fund held by Petitioner as Trustee under the deed executed by Kellam (R., 5). We take it to be undisputed by counsel for the Commonwealth that no greater tax would have been imposed had an identical set of securities been held in absolute estate by a resident of Richmond, Virginia, in his safe-deposit box in a Richmond bank. Certainly, such an inference is inescapable not only from the terms of the judgment of the trial court (R., 3), but also from

the final opinion of the Special Court of Appeals (R., 29).

The tax, it is true, is assessed against Petitioner, the holder of the legal title to the particular estate. It surely, however, cannot be contended that the mere accident of Petitioner's appearance before a Virginia tribunal can justify the taxation of the corpus of a fund held in Maryland, when Petitioner neither resides in Virginia nor is acting in any fiduciary capacity under the supervision of a Virginia Court (R., 2).

No such theory as the foregoing could suffice, we submit, to support the tax imposed in the instant case. On the contrary, from the opinion recently handed down by this Court in the case of *Brooke* v. *Norfolk*, 277 U. S. 27 (for convenience of reference fully set out in an appendix hereto) the true rule seems clear, namely, that a State has power to tax intangibles held without its borders *to the extent only of such interest therein as may belong to a resident of the State.*

The inquiry here, then, is what interest in the fund assessed is owned by residents of Virginia? Obviously, the owners of the largest share are Petitioner's *cestuis*, but although their interest may be technically a fee defeasible, it is certainly not the entirety.* That this is

*See *Saltonstall* v. *Saltonstall*, 276 U. S. 260, where beneficiaries of a trust in which the grantor had reserved a right of revocation claimed that a succession tax imposed upon the death of the grantor was unconstitutional for the reason that their interest had vested before his death and the reserved power was a mere condition subsequent. Yet it was held that the possible defeasance was real enough to justify the tax on the succession. In the instant case, the interests attendant upon defeasance seem equally real and therefore cannot be neglected in computing the totality of the estate.

so is incontrovertibly shown by the following simple test: Assume the disabilities of nonage removed, so that the *cestuis* could validly bind themselves to part with their interest, could they, or either of them, obtain for it the value actually taxed? Obviously not, because any purchaser would unquestionably estimate the probability of a defeasance and reduce accordingly the amount he would be willing to pay. In other words, neither *cestui* can sell the remainder, or whatever estate depends upon his death before 25, since such estate is owned by others, amongst whom are his brother and his own issue (now unborn). We do not now contend that the State of Virginia could not constitutionally tax whatever may be the value of the *cestuis* interest. This, however, she has not seen fit to do since she has not indeed, provided any machinery for ascertaining such value; but has instead taxed the entirety (R., 3).

Still another interest is owned by the grantor's estate, as representing such persons as may take in event both *cestuis* die without issue and under twenty-five years of age. The contingency is not provided for (R., 6, 13) in the trust, and the Record is, of course, silent as to the place of residence of these persons, if they exist or are identifiable. Whoever they are, or wherever they may be, it is clear that their interest is a mere reversion, if we may speak by analogy with the law of real property, and, as such, is far from entire.

The argument used in the final opinion of the Special Court makes it necessary to consider the grantor's estate in another aspect, namely, as standing in the place of the grantor. That, as such, it can claim no ownership is established by the case of *Bullen* v. *Wisconsin,* 240 U. S. 625, since the trust in the instant case became irrevocable upon the senior Kellam's death. No resident ownership can therefore be predicated upon the fact that his administration took place in Virginia.

The interests belonging to the *cestuis* when added to those belonging to the estate fall short of totality by the extent of the interest belonging to the *cestuis'* issue, whom we may with complete confidence assume to have been yet *in futuro* at the time of the institution of these proceedings, as the two boys were then 14½ and 11 years old, respectively (R., 6).

If, therefore, the entire *corpus*, or the absolute estate, is taxable to Petitioner in Virginia, it cannot be because Petitioner's *cestuis* reside here, since they do not own it. Neither can it be because the Kellam Estate was administered in Virginia, since it does not own the *corpus*. Nor do all three together own the *corpus*. In order, therefore, to sustain the jurisdiction of this Commonwealth, she must show residence within her borders of persons yet unborn, persons whose interests, however contingent and remote, are absolutely essential to the totality of that complete and absolute estate which has been actually taxed. Thus expressed, the contention of counsel for the Commonwealth seems to carry its own refutation. We have naturally been unable to find any cases bearing on the *situs* for taxation of interests contingently belonging to persons not *in esse;* but no authority seems necessary to establish the proposition that taxable *situs* does not follow hypothetical persons, who *ex hypothesi* are incapable of having a residence or of being assessed with a tax.

(In passing we may notice the fact that the unborn children of Petitioner's *cestuis* are in no way represented by the grantor's estate. They take solely as purchasers under the trust deed, and their claims will of course be hostile to the reversioners who *are* represented by the estate.)

The contingent interests just discussed would therefore seem to have no *situs* apart from the securities themselves, and the securities are in Maryland, not Virginia. In other words, so far as concerns these con-

tingent interests, there is no "person for the movables to follow".

From the foregoing we respectfully conclude that under the doctrine of the *Brooke* case, *supra*, there is no ownership in Virginia except that of Petitioner's *cestuis* and that of the Kellam Estate, and, taken separately or together, these fall short of being commensurate with the entire interest that has been taxed. The assessment is therefore unconstitutional and void.

B.

THERE IS NO VALID DISTINCTION BETWEEN THE CASE AT BAR AND THE BROOKE CASE.

Lest some point be made of it by counsel for the Commonwealth it may be well to advert here to a difference between the facts of the *Brooke* case, *supra*, and of that at bar. In both, the fund is kept outside Virginia, but in the *Brooke* case it was never in Virginia, and furthermore, the instrument creating it was executed outside the State. In this case, however, both the creation and the origin of the trust fund were intra-state. The distinction, we submit, is more apparent than real. Any theory that would support a tax in the instant case on the ground that the property taxed was once in Virginia must, we conceive, be based on a misconception of State power and jurisdiction.

In the opinion of Mr. Justice Field in *State Tax on Foreign Held Bonds*, 15 Wall. 300, it is said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

See also the opinion of Mr. Justice Van Devanter, in *Frick* v. *Pennsylvania*, 268 U. S. 473, 492:

> "These decisions show, first, that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law. * * * ."

Now, "jurisdiction" and "power to impose" are questions, not of motive, but of fact. Their existence does not depend on the intentions of the person whose object it may be to escape them. Either the property is within the jurisdiction or it is not. Can a tax upon it be justified by a retrospective view of why it is where it is? Surely not. If M, a resident of Virginia, believing his taxes too burdensome and desiring to escape them, removes himself and all his property to another State, could this Commonwealth (assuming she in some way obtained a temporary jurisdiction of his person) impose a tax on his property? Surely not. Yet any theory involving origin as a criterion would justify a tax in that case.

Analogous is the holding of *Buck* v. *Beach*, 206 U. S. 392, 402, where it is said:

> "But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside and beyond the jurisdiction of that State. Jurisdiction of the State of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the State of Indiana these evidences of debts owing him by residents of Ohio. The question still remains, was there any property within the jurisdiction of the State of Indiana, so as to permit that State to tax it, simply because of the presence of the Ohio notes in that State?"

C.

THE OWNERSHIP OF PETITIONER'S CESTUIS CANNOT OF ITSELF CREATE JURISDICTION.

Since in the opinion of the Special Court of Appeals of Virginia (R. 28) the position is taken that the ownership of Petitioner's *cestuis* alone is sufficient to confer jurisdiction upon this Commonwealth, it may be proper to consider the question from the point of view occupied by that court. We have endeavored to show in the first section of this argument that no matter whether the *cestuis* have a mere remainder interest or a defeasible fee such interest as they have is not entire since in any event it does not include the interest of their possible unborn children.

We now, however, respectfully propose to show that Petitioner's *cestuis* are not, from the constitutional point of view, the owners of the fund in any sense of the term. A reference to the three recent cases on ownership and *situs* decided by this Court will make it plain that ownership involves possession or control or the immediate right to either of them. Thus in *Bullen* v. *Wisconsin, supra,* the decedent was held to be the owner of the property taxed because he could at any time before the moment of his death bring it within his absolute and immediate dominion. But in *Wachovia* v. *Doughton,* 272 U. S. 567, although the decedent had, in a foreign trust fund, "the life interest and the power to dispose of the remainder by a will which she could bind herself to make", yet the fund was nevertheless held to have no actual or constructive *situs* in the State which sought to impose the tax. And in *Brooke* v. *Norfolk, supra,* Mrs. Brooke had the full right of enjoyment for life, yet was not the owner. Surely, therefore, where, as in the present case, Petitioner's *cestuis* suffer a further diminution of proprietorship in that they do not now, and may

never, receive any income from the fund, there is no ownership within the meaning of the three cases just cited.

A very interesting case is *Att'y.-Gen.* v. *Power*, [1906] 2 I. R. 272, K. B. D., the appositeness of which to the present discussion will require no comment. We regret that the complicated terms of the trust involved make a short summary impossible. The facts were that by a certain marriage settlement it was provided that after the death of the surviving spouse the lands concerned should be held upon trusts substantially as follows: for the benefit of the children of the marriage and their heirs forever as tenants in common, but if any of the said children should die under 21, then his original share as well as any shares accrued him by virtue of this limitation should be held for the benefit of the survivors and their heirs as before, provided that, so long as any child should remain under age, the trustees should, after applying to the maintenance of such child a suitable sum, retain the residue of the income, invest the same and accumulate the proceeds in trust for such child if he attain 21, or if not, for such persons as should under the terms of the settlement ultimately become indefeasibly entitled. One son, Hubert, survived his parents and died under age. Of the other two sons, one became of age before Hubert's death, the other after, but both before this case arose.

The question was whether the property passing to them under the settlement was liable to estate duty upon Hubert's death.

Held, it was not so liable.

After stating the question for decision: "Was the estate of the deceased in the lands an interest in possession at his death?" or "Did Hubert, under the trusts, take a beneficial interest in the lands, which ceased on his death, within the meaning of Section 2 (6), and Section 5, sub-section 3?", Palles, C. B., went on to say:

"The principle of *In re* Bowlby (1904), 2 Ch. 685, is more in point, although that case was antithetical to the present. The judgments there very markedly show the distinction in the ownership of the surplus, after payment of maintenance, of the interest, during minority, on a legacy to a child, between the cases, on the one hand, of the legacy being vested, and, on the other, of the legacy being contingent, with an express direction for the child's maintenance. In the one case, the surplus is the property of the child; in the other, it forms an accretion to the capital, and does not necessarily go to the child or his representatives. The present is a correlative case. Here, although the estate is vested, subject to being divested, all the rents and profits until Hubert's death were captured by the trusts, and the surplus income after payment of maintenance, instead of being the property of the child in any event, formed an accretion to the estate, and went with it to the present defendants. Thus, the reasoning in reference to the distinction between maintenance and interest there is applicable to the distinction here between maintenance and rents and profits. Had Hubert here been entitled to the entire surplus of the rents and profits of his share, I should have held his estate was one in possession; but being, as I hold him to be, entitled to part only of that surplus, and that fluctuating, uncertain, and incapable of being defined or ascertained irrespective of its application, I must hold that his estate is not in possession, and that such sums as he might receive for maintenance were payable to him, not by reason of his vested estate, which must be taken to be subject to the estate or interests of the trustees, but as maintenance *eo nomine*, out of the express trust for its payment to him out of the interim income of an estate, the present income of which was not his, but the trustees'.

"As conveyancing forms must, to a certain extent, be disregarded in questions upon this Act, so that a person cannot be permitted to evade estate duty by clothing a transaction, which was in its reality and essence one which would subject the property to estate duty in a particular event, in such a conveyancing form that it would escape it, so I think that it can be well contended that a transaction cannot be made liable to duty merely by its conveyancing form, when the beneficial estate actually taken is substantially the same as would have been taken under a conveyance in the ordinary form, and when, if taken in the latter form, it would not be within the Act. For this reason, I think well worthy of consideration Mr. Ronan's argument that the beneficial estates which the children took under the settlement are identical with those they would have had, had the estates been limited to the use of the trustees and their heirs in trust, in the specified event, for such children of the marriage as being sons should attain twenty-one, or being daughters should attain that age or marry, or who, whether sons or daughters, should die under twenty-one, leaving issue living at his or her death, with such a provision for maintenance as is here, or without it, in which event a substantially similar provision would have been implied by the Conveyancing Act. In such a case, would estate duty be payable on the death of a child who died without having attained a vested interest in the estate? I understood the Attorney-General to admit—and I think he was right—that it would not. What is the difference in substance between that case and the present? I confess that I cannot see any."

We respectfully conclude that the ownership pertaining to Petitioner's *cestuis* will not support the tax.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the right, title, privilege and immunity under the 14th Amendment of the Constitution of the United States, denied to Petitioner by the decision of the Special Court of Appeals of Virginia in this cause, should be restored to it, and that to such an end a writ of *certiorari* should be granted and this Court should review the decision of the said Special Court of Appeals of Virginia and finally reverse it.

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A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
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Counsel for Petitioner.

APPENDIX.

Brooke v. *City of Norfolk, et als.*, 277 U. S. 27.

(April 23, 1928.)

Mr. Justice Holmes delivered the opinion of the Court.

The Petitioner applied in the local form of proceeding for the correction of two assessments for taxation alleged to be erroneous and contrary to the Fourteenth Amendment. The court of first instance, the Corporation Court of the City of Norfolk, upheld both assessments as valid, and the Supreme Court of Virginia rejected a petition for a writ of error on the ground that the judgment below was plainly right. A writ of *certiorari* was granted by this Court. 274 U. S. 734.

The assessments complained of were for City and State taxes upon the corpus of a trust fund created by the will of a citizen of Maryland resident in Baltimore at the time of her death. This will bequeathed to the Safe Deposit and Trust Company of Baltimore eighty thousand dollars in trust to pay the income to the petitioner for life, then to her daughters for their lives, upon the death of the last survivor, to divide the principal between the descendants then living of the daughters *per stirpes*. The will was proved in Maryland, and in 1914 was admitted to probate in the Corporation Court of Norfolk as a foreign will. The property held in trust has remained in Maryland and no part of it is or ever has been in Virginia.

The petitioner has paid without question a tax upon the income received by her. But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole. No doubt in the case of tangible property lying within the State and subject to a paramount

lien for taxes, the occupant actually using it may be made personally liable. *Illinois Central R. R. Co.* v. *Kentucky*, 218 U. S. 551, 562; *Carstairs* v. *Cochran*, 193 U. S. 10, 16. But here the property is not within the State, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See *Wachovia Bank and Trust Co.* v. *Doughton*, 272 U. S. 567, 575.

Judgment reversed.

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BRIEF FOR APPELLANT.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 420

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
Appellant,

v.

THE COMMONWEALTH OF VIRGINIA, Appellee.

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia.

J. Jordan Lemmon,
A. S. Buford, Jr.,
Appleton M. Wickham,
William Pepper Constable,
Jos. M. Hood, Jr.,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 618.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT,

v.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

I.

THE OPINIONS OF THE COURT BELOW.

The first opinion of the Special Court of Appeals of Virginia (R. 9), was rendered on March 1st, 1928, and, it is believed, will not be officially reported, having been superseded by—

The final opinion of the said Special Court of Appeals (R. 21) rendered on rehearing on October 30th, 1928, and not yet officially reported. It is to be found in 145 S. E. at page 326, and will doubtless appear in 151 Va. under the style of *Trust Company of Norfolk, et al., v. Commonwealth.*

II.

JURISDICTION.

1. *Basis quoad the Statutes.*

Act, Feb. 13, 1925, c. 229, §237 (a), 43 Stat. 937, (U. S. C., Tit. 28, Judicial Code and Judiciary, §344, par. [a]).

Act, Jan. 31, 1928, c. 14, §1, 45 Stat. 54; Act, Apr. 26, 1928, c. 440, 45 Stat. 466, (U. S. C., Tit. 28, Judicial Code & Judiciary, §§861-1 and 861-2).

2. *Basis quoad Timeliness.*

The judgment appealed from was rendered on October 30th, 1928, (R. 21, 30).

Appellant's petition for an appeal to this Court was presented to, and allowed by, the President of the Special Court of Appeals of Virginia on December 15th, 1928 (R. 33, 34), and the papers in the Appeal were filed in this Court on January 9th, 1929 (R. 36).

3. *Basis quoad the Facts.*

First, with respect to the time of raising the constitutional question:

In its Petition for Rehearing addressed to the Special Court of Appeals (R. 18-20) Appellant expressly questioned and denied the validity—under §1 of the 14th Amendment of the United States Constitution—of Section 2307 of the Code of Virginia of 1919 (as amended) as interpreted in this case. The question

was considered by the Court, for the reason stated in the opinion on Rehearing (R. 21), and was decided adversely to Appellant's contention (R. 29, 30).

Second, with respect to the nature of the case[1]:

The applicable statute, and the general assessment law of the Commonwealth, is Section 2307 of the Code of Virginia of 1919 (R. 12). Insofar as relevant to the present litigation, it was left unchanged by the Acts of 1920[2], 1922[3], and 1923[4], the significant provisions of which last, and consequently of all three, were exhibited by Appellant with its Assignment of Error (R. 31) and are set out in the Appendix hereto (*infra,* p. 20). Most of the portions so set out concern those to whom, amongst various classes of owners and fiduciaries, property is to be assessed and taxed. *Situs* of property without the Commonwealth is fixed by the following provision:

> "If the property consists of money, bonds, stocks, or other evidence of public or private debts in any * * * State other than Virginia, it shall be listed by and taxed to the owner thereof; * * *."

The circumstances in which the said Statute was applied, and out of which this Appeal arose, were as follows:

On May 4th, 1920, one Lucius J. Kellam, a domiciled citizen and resident of Virginia (R. 3), executed a deed of trust (R. 5) by which he transferred to Appellant

---

[1]In order to show that the nature of the case and the rulings of the Special Court of Appeals of Virginia are such as to create jurisdiction on appeal it will be necessary to detail the facts fully at this point.

[2]Acts of Assembly, 1920, ch. 376.

[3] *Id.,* 1922, ch. 520.

[4] *Id.,* 1923, ch. 104.

certain securities, listed in a schedule attached to the deed (R. 7), and valued at approximately $50,000.00. The said securities were accordingly delivered to Appellant, were accepted by it, and are held at its place of business in Maryland upon the following trusts (R. 6):

> "To be held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

No provision was made for the event of the death of *both* sons under twenty-five, without issue (R. 13).

There was reserved to the donor a full right of revocation. To facilitate reinvestment, power was given Appellant to cause the securities to be registered in its own name; but it was required to obtain the donor's approval before making any change (R. 6, 7).

Three months after executing this instrument the donor died; the trust remaining unrevoked (R. 2, 4). Administration on his estate was had in Virginia (R. 2, 28) and his two sons continue to reside in Accomac County (R. 3).

Except insofar as they may have been changed by reinvestment, the securities transferred have remained in Appellant's possession in Maryland (R. 4), where they have been regularly listed for taxation, and all state and city taxes paid (R. 5).

Virginia having also assessed state taxes against the property (R. 1), Appellant had recourse to the Circuit Court for Accomac County for relief[1] (R. 1). The application was denied on the ground that the entire *corpus* was properly assessable (R. 3).

At the time of application, as is apparent from the dates given in the extract from the trust deed, *supra*, both *cestuis* were under twenty-five (R. 1) and both were alive (R. 2). It may be safely assumed, although the record nowhere explicitly so states, that they were then, and still remain, without issue.

An appeal having been taken from the Circuit Court to the Special Court of Appeals of Virginia, the highest court in which a decision might be had, the validity of

---

[1]The assessments of the same property against Trust Company of Norfolk (a Virginia corporation) stricken out by the Circuit Court (R. 3), and against Carrie P. Kellam, mother and guardian of the two children, stricken out by the Special Court of Appeals in its first opinion on appeal (R. 18) are immaterial to the present question.

the Statute under the Constitution was duly questioned by Appellant, and considered and passed upon by the court, on the dates and with the results already set out (*supra*, p. 2.)

In the course of the opinion on Rehearing it was said (R. 28, 29):

> "The two sons are residents of Virginia, and administration upon the donor's estate could only take place in Virginia. *Unless the two sons are owners, or in conjunction with the personal representative of the donor's estate they constitute the owners,* then this fund has no ownership. * * *
>
> "The court is of opinion that no non-residents are owners or have any interest in the corpus of the trust fund in Baltimore; *that the present, and if essential, the ultimate owners of the property are residents of the State of Virginia;* that the assessment in this case does not require any persons to pay a tax upon intangible personal property to which they are strangers.
>
> "We are further of opinion that both the owners and the *situs* of the intangibles in question have at all times been and still are within the jurisdiction of the State of Virginia, and *therefore the assessment made in this case is not in any way violative of or repugnant to the 14th Amendment to the Constitution of the United States.* The real problem is, how the property should be assessed, and who should be required to pay the tax. In the judgment rendered by the Court this was solved by directing the trustee, who has temporary possession of the securities, to pay the tax, just as is now being done by the Norfolk trustee."

From the foregoing it is plain that what the Special Court decided was that the word "owner" appearing in the quotation from the Statute, *supra*, is correctly

interpreted when it is used to denote those[1] who bear to to the *entire corpus* of the trust fund such relationship as it borne to it by Appellant's *cestuis* and/or the donor's estate.

It is the Appellant's contention that so interpreted the Statute is void for unconstitutionality. The case is as if some statute to the effect that "all property held outside the state shall be taxed to the owner" had been construed by the lower court to mean that the Commonwealth could, despite the due process clause, tax its citizen on land owned by him and situated in another state.

4. *Cases believed to sustain the Jurisdiction.*

First, with respect to the time of raising the constitutional question:

Sullivan v. *Texas,* 207 U. S. 416, 422;
Bowe v. *Scott,* 233 U. S. 658, 663;
Grannis v. *Ordean,* 234 U. S. 385, 392.

Second, with respect to the nature of the case:

Dahnke-Walker Co. v. *Bondurant,* 257 U. S. 282, 288, 289.

Cudahy Packing Co. v. *Parramore,* 263 U. S. 418, 422.

Fiske v. *State of Kansas,* 274 U. S. 380, 385.
Kansas, etc., Co. v. *Arkansas,* 269 U. S. 148, 149;
Wachovia, etc., Co. v. *Doughton,* 272 U. S. 567, 573.

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[1] "Though the tax is assessed in the name of the trustee, the burden is in reality imposed upon the beneficial owner, a resident of the Commonwealth who enjoys the protection, etc., etc." We extract this from the first opinion (R. 14) to show that the fact that the tax was actually assessed against the Appellant is immaterial.

III.

STATEMENT OF THE CASE.

(In the interest of brevity the statement of the case set out under II, 3, of this brief (*supra*, p. 3, *et seq.*) is not repeated here except by reference.)

IV.

SPECIFICATION OF ERRORS.

The Special Court of Appeals of Virginia under the facts of this case erred in so interpreting Section 2307 of the Code of Virginia of 1919 (*or* Acts of Assembly of Virginia, 1923, ch. 104[1]) as to sustain, under §1 of the 14th Amendment of the Constitution of the United States, the validity of the said Statute and of certain taxes assessed in pursuance thereof upon the fund held by Appellant.

V.

ARGUMENT.[2]

Summary.

If the word "owner" in the Statute is correctly interpreted so as to describe, *quoad* the *entire corpus* of the fund held by Appellant's *cestuis* and/or the Kellam estate, then the Statute is unconstitutional. In other words, it is unconstitutional unless the *cestuis* and/or the estate "own" the entire *corpus*. The argument in support of the proposition may be summarized as follows:

---

[1]See Appendix.

[2]In the quotations herein italics are supplied unless otherwise indicated.

A. Under the doctrine of the Brooke case, a state has power to tax intangibles held without its borders only so far as the same may be owned by a resident, and under the facts of this case there is no ownership in Virginia commensurate with the (absolute) estate actually taxed.

B. The Brooke case cannot be validly distinguished from the case at bar on the ground that the several trust funds had different territorial origins.

C. The interest of Appellant's cestuis when particularly considered discloses their lack of ownership.

A.

Under the Doctrine of the Brooke Case, a State has Power to Tax Intangibles held without its Borders only so far as the same may be Owned by a Resident, and under the Facts of this Case there is no Ownership in Virginia Commensurate with the (Absolute) Estate Actually Taxed.

In this case the Commonwealth of Virginia has assessed a tax against the whole of the fund held by Appellant as trustee under the deed executed by Kellam before his death (R. 5). We take it to be undisputed by counsel for the Commonwealth that no greater tax would have been imposed had an identical set of securities been held in absolute estate by a resident of Richmond, Virginia, in his safe-deposit box in a Richmond bank. Certainly, such an inference is inescapable not only from the terms of the judgment of the trial court (R. 3), but also from the final opinion of the Special Court of Appeals (R. 29).

The tax, it is true, is assessed against Appellant, the holder of the legal title to the particular estate. It surely, however, cannot be contended that the mere accident of Appellant's appearance before a Virginia tribunal can justify the taxation of the corpus of a fund held in Maryland, when Appellant neither resides in Virginia nor is acting in any fiduciary capacity under

the supervision of a Virginia court (R. 2). In this connection, reference is made to the note, *supra*, p. 7, and to the case of *Dewey* v. *Des Moines*, 173 U. S. 193, 203, which holds that a non-resident by resorting to a state court to obtain relief from an assessment against his property and from a personal liability therefor does not "thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability".

No theory, therefore, based solely on Appellant's general appearance before the Circuit Court of Accomac could suffice, we submit, to support the tax imposed in the instant case. On the contrary, from the opinion recently handed down by this Court in the case of *Brooke* v. *Norfolk*, 277 U. S. 27, the true and only rule seems clear, namely, that a State has power to tax intangibles held without its borders *to the extent only of such interest therein as may belong to a resident of the State.*

The inquiry here, then, is what interest in the fund assessed is owned by residents of Virginia? Obviously, the owners of the largest share are Appellant's *cestuis*, but, though their interest may be technically a fee defeasible, it is certainly not the entirety.[1] That this is so is incontrovertibly shown by the following simple test: Assume the disabilities of nonage removed, so that the *cestuis* could validly bind themselves to part with their interest, could they, or either of them, obtain

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[1]See *Saltonstall* v. *Saltonstall*, 276 U. S. 260, where beneficiaries of a trust as to which the grantor had reserved a right of revocation claimed that a succession tax imposed upon the death of the grantor was unconstitutional for the reason that their interest had vested before his death and the reserved power was a mere condition subsequent. Yet it was held that the possible defeasance was real enough to justify the tax on the succession. In the instant case, the interests attendant upon defeasance seem equally real and therefore not to be neglected in computing the totality of the estate.

for it the value actually taxed? Obviously not, because any purchaser would unquestionably estimate the probability of a defeasance and reduce accordingly the amount he would be willing to pay. In other words, neither *cestui* can sell the remainder, or whatever estate depends upon his death before 25, since such estate is owned by others, amongst whom are his brother and his own issue (now unborn). We do not now contend that the State of Virginia could not constitutionally tax whatever may be the value of the *cestui's* interest. This, however, she has not seen fit to do (as she has not, indeed, provided any machinery for ascertaining such value); but, on the contrary, she has taxed the entirety (R. 3).

Still another interest is owned by the Kellam estate, as representing such persons as may take in event both *cestuis* die without issue and under twenty-five years of age. The contingency is not provided for (R. 6, 13) in the trust, and the record is, of course, silent as to the place of residence of these persons, if they exist or are identifiable. Whoever they are, or wherever they may be, it is clear that their interest is a mere reversion, if we may speak by analogy with the law of real property, and, as such, is far from entire.

An argument used in the final opinion of the Special Court makes it necessary to consider the Kellam estate in another aspect, *viz.*, as standing in the place of the grantor. That, as such, it can claim no ownership is established by the case of *Bullen* v. *Wisconsin*, 240 U. S. 625, since the trust in the instant case became irrevocable upon the senior Kellam's death. No resident ownership, therefore, can be predicated upon the fact that his administration took place in Virginia.

The interests belonging to both *cestuis* when added to those belonging to the estate fall short of totality by the extent of the interest belonging to the *cestuis'* issue, whom, as already stated, we may with complete confidence assume to have been yet *in futuro* at the time of

the institution of these proceedings, as the two boys were then, respectively, 14½ and 11 years old. (R. 6.)

If, therefore, the entire *corpus*, or the absolute estate, is taxable to Appellant by Virginia, it cannot be because Appellant's *cestuis* reside here, since they do not own it. Neither can it be because the Kellam estate was administered in Virginia, since it does not own the *corpus*. Nor do all three together own the *corpus*. In order, therefore, to sustain the validity of the Statute, the Commonwealth must show residence within her borders of persons yet unborn, persons whose interests, however contingent and remote, are absolutely essential to the totality of that complete and absolute estate which has been actually taxed. Thus expressed, the position of counsel for the Commonwealth seems to carry its own refutation. We have naturally been unable to find any cases bearing on the *situs* for taxation of interests contingently belonging to persons not *in esse;* but no authority seems necessary to establish the proposition that taxable *situs* does not follow hypothetical persons, who *ex hypothesi* are incapable of having a residence or of being assessed with a tax.

(In passing we may notice the fact that, unlike possible reversioners, the unborn children of Appellant's *cestuis* are in no way represented by the Kellam estate. They take solely as purchasers under the trust deed and their claims will of course be hostile to the reversioners who *are* represented by the estate.)

The contingent interests just discussed would therefore seem to have no *situs* apart from the securities themselves, and the securities are in Maryland, not Virginia. In other words, so far as concerns these contingent interests, there is no "person for the movables to follow".

From the foregoing we respectfully conclude that under the doctrine of the *Brooke* case, *supra*, there is no ownership in Virginia except that of Appellant's *cestuis*

and that of the Kellam estate, and, taken separately or together, these fall short of being commensurate with the entire interest that has been taxed. Thus there can be no constitutional owner under the Statute and the assessment is consequently unconstitutional and void.

B.

The Brooke Case cannot be Validly Distinguished from the Case at Bar on the Ground that the several Trust Funds had Different Territorial Origins.

Lest some point be made of it by counsel for the Commonwealth it may be well to advert here to a difference between the facts of the *Brooke* case, *supra*, and the facts of that at bar. In both, the fund is kept outside Virginia, but in the *Brooke* case it never was in Virginia, and furthermore, the instrument creating it was executed outside the State. In the present case, however, both the creation and the origin of the trust fund were intra-state. The distinction, we submit, is more apparent than real. Any theory that would support a tax in the instant case on the ground that the property taxed was once in Virginia must, we conceive, be based on a fundamental misconception of State power and jurisdiction.

In the opinion of Mr. Justice Field in *State Tax on Foreign Held Bonds*, 15 Wall. 300, it is said (p. 319):

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the *jurisdiction* of the State."

See also the opinion of Mr. Justice Van Devanter, in *Frick* v. *Pennsylvania*, 268 U. S. 473, 492:

"These decisions show, first, that the exaction by a State of a tax which it is without *power* to impose is a taking of property without due process of law. * * *."

Now, "jurisdiction" and "power to impose" a tax are questions, not of motive, but of fact. Their existence does not depend on the intentions of the person whose object it may be to escape them. Either the property is within the jurisdiction or it is not. Can a tax upon it be justified by a retrospective view of why it is where it is? Surely not. If M, a resident of Virginia, believing his taxes too burdensome and desiring to escape them, removes himself and all his property to another State, could this Commonwealth (assuming she in some way obtained a temporary jurisdiction of his person) impose a tax on his property? Surely not. Yet any theory involving origin as a criterion would justify a tax in that case.

Analogous is the holding of *Buck* v. *Beach*, 206 U. S. 392, 402, where it is said:

"But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside and beyond the jurisdiction of that State. Jurisdiction of the State of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the State of Indiana these evidences of debts owing him by residents of Ohio. The question still remains, was there any property within the jurisdiction of the State of Indiana, so as to permit that State to tax it, simply because of the presence of the Ohio notes in that State?"

C.

The Interest of Appellant's Cestuis when Particularly Considered discloses their lack of Ownership.

We have already endeavored to show, in subhead A hereof, that no matter whether the Appellant's *cestuis* have a mere remainder interest or a defeasible fee, such interest as they have is not entire because in any event it does not include the interest of their possible unborn children. Since, however, the position was taken in the opinion of the lower court (R. 28) that the ownership of the *cestuis* alone was sufficient to confer jurisdiction upon this Commonwealth, it may be proper to consider the question from that court's point of view.

We therefore now respectfully purpose to show that Appellant's *cestuis* are not, from the constitutional standpoint, the owners of the fund in any sense of the term. A reference to the three recent cases on ownership and *situs* decided by this Court will make it plain that ownership is not a technical conception but one that should be viewed realistically and as meaning possession or control, or the immediate right to either. Thus in *Bullen* v. *Wisconsin, supra,* the decedent was held to be the owner of the property taxed because he could at any time before the moment of his death bring it within his absolute and immediate dominion. But in *Wachovia* v. *Doughton,* 272 U. S. 567, although the decedent had, in a foreign trust fund, "the life interest and the power to dispose of the remainder by a will which she could bind herself to make", yet it was nevertheless apparently decided that the fund was not so owned by the decedent as to create for it an actual or constructive *situs* in the State which sought to impose the tax. And in *Brooke* v. *Norfolk, supra,* Mrs. Brooke had the full right of enjoyment for life, yet was not the owner. Surely, therefore, where,

as in the present case, Appellant's *cestuis* suffer a further diminution of proprietorship in that they do not now, and may never, receive any income from the fund, there is no ownership within the meaning of the three cases just cited.

A very interesting case is *Att'y.-Gen.* v. *Power*, [1906] 2 I. R. 272, K. B. D., the appositeness of which to the present discussion will require no comment, though unfortunately the complicated trust involved makes a short summary impossible. The facts were that by a certain marriage settlement it was provided that after the death of the surviving spouse the lands concerned should be held upon trusts substantially as follows: for the benefit of the childrden of the marriage and their heirs forever as tenants in common, but if any of the said children should die under 21, then his original share as well as any shares accrued him by virtue of this limitation should be held for the benefit of the survivors and their heirs as before, provided that, so long as any child should remain under age, the trustees should, after applying to the maintenance of such child a suitable sum, retain the residue of the income, invest the same and accumulate the proceeds in trust for such child if he attain 21, or if not, for such persons as should, under the terms of the settlement ultimately become indefeasibly entitled. One son, Hubert, survived his parents and died under age. Of the other two sons, one became of age before Hubert's death, the other after, but both before this case arose.

The question was whether the property passing to them under under the settlement was liable to estate duty upon Hubert's death.

Held, it was not so liable.

After stating the question for decision: "Was the estate of the deceased in the lands an interest in possession at his death?" or "Did Hubert, under the trusts, take a beneficial interest in the lands, which ceased on his death, within the meaning of Section 2

(6), and Section 5, sub-section 3?", Palles, C. B., went on say:

"The principle of *In re Bowlby*, (1904) 2 Ch. 685, is more in point, although that case was antithetical to the present. The judgments there very markedly show the distinction in the ownership of the surplus, after payment of maintenance, of the interest, during minority, on a legacy to a child, between the cases, on the one hand, of the legacy being vested, and, on the other, of the legacy being contingent, with an express direction for the child's maintenance. In the one case, the surplus is the property of the child; in the other, it forms an accretion to the capital, and does not necessarily go to the child or his representatives. The present is a correlative case. Here, although the estate is vested, subject to being divested, all the rents and profits until Hubert's death were captured by the trusts, and the surplus income after payment of maintenance, instead of being the property of the child in any event, formed an accretion to the estate, and went with it to the present defendants. Thus, the reasoning in reference to the distinction between maintenance and interest there is applicable to the distinction here between maintenance and rents and profits. Had Hubert here been entitled to the entire surplus of the rents and profits of his share, I should have held his estate was one in possession; but being, as I hold him to be, entitled to part only of that surplus, and that fluctuating, uncertain, and incapable of being defined or ascertained irrespective of its application, I must hold that his estate is not in possesion, and that such sums as he might receive for maintenance were payable to him, not by reason of his vested estate, which must be taken to be subject to the estate or interests of the trustees, but as maintenance *eo nomine*, out of the ex-

press trust for its payment to him out of the interim income of an estate, the present income of which was not his, but the trustees'.

"As conveyancing forms must, to a certain extent, be disregarded in questions upon this Act, so that a person cannot be permitted to evade estate duty by clothing a transaction, which was in its reality and essence one which would subject the property to estate duty in a particular event, in such a conveyancing form that it would escape it, so I think that it can be well contended that a tranaction cannot be made liable to duty merely by its conveyancing form, when the beneficial estate actually taken is substntially the same as would have been taken under a conveyance in the ordinary form, and when, if taken in the latter form, it would not be within the Act. For this reason, I think well worthy of consideration Mr. Ronan's argument that *the beneficial estates which the children took under the settlement are identical with those they would have had, had the estates been limited to the use of the trustees and their heirs in trust, in the specified event, for such children of the marriage as being sons should attain twenty-one, or being daughters should attain that age or marry, or who, whether sons or daughters, should die under twenty-one, leaving issue living at his or her death, with such provision for maintenance as is here,* or without it, in which event a substantially similar provision would have been implied by the Conveyancing Act. In such a case, would estate duty be payable on the death of a child who died without having attained a vested interest in the estate? I understood the Attorney-General to admit—and I think he was right—that it would not. What is the difference in substance between that case and the present? I confess that I cannot see any."

The italicised part of the foregoing quotation shows the practical identity of the interest of Appellant's *cestuis* (call it a fee defeasible or not) and an ordinary contingent remainder. Reflection will show that the feature of accumulation is largely responsible for the similarity. Surely the owner of a contingency should not be taxable as if he owned the whole.

We respectfully conclude that the ownership pertaining to Appellant's *cestuis* in their own right will not support the constitutionality of the Statute.

CONCLUSION.

WHEREFORE, it is respectfully submitted that, for the error herein assigned, the aforesaid judgment of the Special Court of Appeals of Virginia should be reversed, and judgment entered for the Appellant.

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A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOSEPH M. HURT, JR.,
Counsel for Appellant.

APPENDIX

Chap. 104—An Act to Amend and Re-enact Section 2307 of the Code of Virginia, as Heretofore Amended.

Approved March 26, 1923.

1. Be it enacted by the General Assembly of Virginia, That section twenty-three hundred and seven of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 2307. By whom property is to be listed; to whom taxed.—If property be owned by a person *sui juris,* it shall be listed and taxed to him. If property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has; if he has no father, then it shall be listed by and taxed to his mother, if any he has; and if he has no guardian, nor trustee, father nor mother, it shall be listed by and taxed to the person in possession. If the property is the separate property of a person over twenty-one years of age or a married woman, it shall be listed by and taxed to the trustee, if any they have in this State; and if they have no trustee in this State, it shall be listed by and taxed to themselves. In either case, it shall be listed and taxed in the county or city where they reside; but if they be non-residents of Virginia, the property shall be listed and taxed in the county or city wherein such trustee resides. If the property be the estate of a deceased person, it shall be listed by the personal representative or person in possesion, and taxed to the estate of such deceased person. * * * If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county or city of his residence (except as hereinbefore provided) * * *

If the property consists of money, bonds, stocks, or other evidences of public or private debts in any county or city other than that of his residence, or State other than Virginia, it shall be listed by and taxed to the owner thereof; and it shall be the duty of the respective examiners of records of the several judicial circuits where the respective fiduciaries are appointed or qualified, to report to the respective commissioners of the revenues of the counties or cities in which said property is liable for taxation, all property held by said fiduciaries, to be taxed as provided by law. If the property be listed by and taxed to any person other than the owner, it shall not be delivered to the owner until the taxes thereon are paid or indemnity given to the person in possession, for the payment thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 20

SAFE DEPOSIT AND TRUST COMPANY
OF BALTIMORE, MARYLAND,
Appellant-Petitioner,
vs.
THE COMMONWEALTH OF VIRGINIA,
Appellee-Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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LEWIS PRINTING CO., INC., RICHMOND, VA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 618

SAFE DEPOSIT AND TRUST COMPANY
OF BALTIMORE, MARYLAND,
Appellant-Petitioner,
vs.
THE COMMONWEALTH OF VIRGINIA,
Appellee-Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

A

PETITIONER IS AN IMPROPER PARTY

The Appellant-Petitioner is an improper party to these proceedings and is not entitled to a writ of certiorari for

the reason that it has not been and cannot be affected by these proceedings and has no material interest herein.

The suit was first instituted in the name of "Trust Company of Norfolk, Virginia, and The Safe Deposit and Trust Company of Baltimore, Maryland, Guardian and Trustees for L. J and E. P. Kellam" (R., 1).

The taxes were ordered by the Circuit Court of Accomac county, Virginia, to be assessed against "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., 3).

The Special Court of Appeals of Virginia, by its first decision, amended the assessment of the Circuit Court by striking therefrom the words: "and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., 18).

This amended assessment was adhered to by the Special Court of Appeals upon the rehearing (R., 29).

The final judgment of the Special Court of Appeals (R., 30), from which the appeal was taken and which forms the basis of the petition for a writ of certiorari, together with the orders referred to above (R., 3, 18 and 29), show conclusively that the proper party appellant or petitioner is "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam," and not that company in its individual capacity.

See *United States ex rel State of Louisiana* v. *Boarman,* 244 U. S. 397.

Estis v. *Trabue,* 128 U. S. 225

Inglehart v. *Stansbury,* 151 U. S. 68.

American Baptist Home Mission Society v. *Barnett et al.*, 26 F. (2d) 350.

The assessment and the taxes imposed thereunder against the Trustee do not deprive the appellant-petitioner of any property without due process of law. The appellant-petitioner has no beneficial interest in the property, is compelled, under the terms of the trust deed, to pay out of the fund such taxes as may be charged thereon (R., 6), and is merely the holder of the bare legal title.

B

THE TAXES WERE ASSESSED WITH DUE PROCESS OF LAW

The tax is imposed by Virginia upon two of her residents on account of intangible personal property owned by them.

The highest Virginia court has held that the deed of trust conferred on the two sons an absolute gift subject to be divested upon a condition subsequent (R., 28). The mere remote possibility of a reverter, by the death of the two sons under twenty-five years of age and without issue, does not affect the vested estates of the sons. Until that event happens, the sons own the property. And such property is taxable by Virginia.

See *Fidelity & Columbia Trust Co.* v. *City of Louisville, Ky.*, 245 U. S. 54.

Blotgett v. *Silberman*, 277 U. S. 1.

C

BROOKE CASE DISTINGUISHED

The Special Court of Appeals of Virginia, in its exhaustive opinion herein by Crump, P., (R., 21) carefully considered and discussed *Brooke* v. *Norfolk*, 277 U. S. 27, and (R., 24, 28) held that this case was distinguished from the *Brooke Case* in that here the two sons were the owners of the property, as set out under B, *supra*, while Mrs. Brooke had no interest in the property involved in that case.

CONCLUSION

It is, therefore, respectfully submitted that this case is not one calling for the exercise by this court of its supervisory powers, for the reason that no right, title, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States has been denied to petitioner, and the appeal should be dismissed and the petition for a writ of *certiorari* should be denied.

W. W. MARTIN,
HENRY R. MILLER, JR.,
Counsel for Appellee-Respondent.

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BRIEF ON BEHALF OF APPELLEE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND, *Appellant*

vs.

THE COMMONWEALTH OF VIRGINIA, *Appellee*

APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

W. W. MARTIN,
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Counsel for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 618

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND, *Appellant*

vs.

THE COMMONWEALTH OF VIRGINIA, *Appellee*

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF THE CASE

Appellant has, on pages 3, 4, 5 and 6 of its Brief, correctly stated the facts in the case and quoted the pertinent provisions of the deed of trust and the Appellee, in

the interest of brevity, will not repeat such statement and quotation.

It is also correctly stated by Appellant that the Special Court of Appeals decided that the word "owner," in Section 2307 of the Code of Virginia of 1919 (R., p. 12), is correctly interpreted when it is used to denote those who bear to the *entire corpus* of the trust fund such relationship as is borne to it by Appellant's *cestuis* and the donor's estate.

The Appellee asserts that such an interpretation renders the application of the statutes to the facts herein and to the assessment of the taxes constitutional.

As to such interpretation of the Virginia statute, Appellant, on page 7 of its brief, makes the following statement:

> "It is the Appellant's contention that so interpreted the Statute is void for unconstitutionality. The case is as if some statute to the effect that 'all property held outside the state shall be taxed to the owner' had been construed by the lower court to mean that the Commonwealth could, despite the due process clause, tax its citizen on land owned by him and situated in another state."

It is inconceivable how such a conclusion can be fairly drawn from the decision of the Special Court of Appeals. The Appellant has apparently disregarded the fundamental difference between land and intangible personalty, with regard to taxation thereof. The location of intangible personalty is immaterial in the assessment there-

of to the owner, while the location of land is all important.

Before arguing the validity of the assessment upon the merits of the case (*post.* p. 4), the Court's attention is directed to the procedure which has been had herein.

A.—AS TO PROCEDURE

Petitioner is an Improper Party

The Appellant is an improper party to these proceedings for the reason that it has not been and cannot be affected by these proceedings and has no material interest herein.

The suit was first instituted in the name of "Trust Company of Norfolk, Virginia, and The Safe Deposit and Trust Company of Baltimore, Maryland, Guardian and Trustees for L. J. and E. P. Kellam" (R., p. 1).

The taxes were ordered by the Circuit Court of Accomac County, Virginia, to be assessed against "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., p. 3).

The Special Court of Appeals of Virginia, by its first decision, amended the assessment of the Circuit Court by striking therefrom the words: "and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., p. 18).

This amended assessment was adhered to by the Special Court of Appeals upon the rehearing (R., p. 29).

The final judgment of the Special Court of Appeals (R., p. 30), from which the appeal was taken, together

with the orders referred to above (R., pp. 3, 18 and 29), show conclusively that the proper party Appellant is "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam," and not that company in its individual capacity.

See *United States, ex rel State of Louisiana* vs. *Jack, Judge,* 244 U. S. 397, 402.
Estis vs. *Trabue,* 128 U. S. 225, 229, 230.
Inglehart vs. *Stansbury,* 151 U. S. 68, 71, 72.
American Baptist Home Mission Society vs. *Barnett, et al.,* 26 F. (2d) 350, 352.

The assessment and the taxes imposed thereunder against the Trustee do not deprive the Appellant of any property without due process of law. The Appellant has no beneficial interest in the property, is compelled, under the terms of the trust deed, to pay out of the fund such taxes as may be charged thereon (R., p. 6), and is merely the holder of the bare legal title.

B.—AS TO THE MERITS OF THE CASE

1. The Taxes Were Assessed With Due Process of Law

By an Act of the General Assembly of Virginia, approved April 16, 1903 (Va., Acts 1902-03-04, pp. 155, 156, 158), it was enacted that:

"* * * 3. The taxable subjects shall be classified by schedules as follows, to-wit: * * *

"Schedule C.

"8. The classifications under Schedule C. shall be as follows:

"Personal Property in Choses in Action, Etc. First. Bonds, notes and other evidences of debt, including bonds of other States * * *, and all demands and claims, however evidenced, whether secured by deed of trust, judgment, or otherwise, or not so secured. * * *"

By successive Acts of the General Assembly this section has been repeatedly amended, but the same definition of taxable intangible personal property is found in all of the laws in force during the years 1921, 1922, 1923, 1924 and 1925, for which years the assessments were made herein.

See: Va. Acts, 1918, p. 171.
Va. Acts, 1920, p. 793.
Va. Acts, 1922, p. 551.
Va. Acts, 1924, p. 468.

The two Kellam sons were the owners of intangible personal property as defined above which property was taxable under the Acts just referred to and the assessment of taxes was made accordingly.

Under the doctrine of *mobilia sequuntur personam,* approved in *Blodgett* vs. *Silberman, 277* U. S. 1, 9, Virginia may tax to its residents such property, even though the physical evidences thereof be located outside the juris-

diction of Virginia (*Fidelity & Columbia Trust Co.* vs. *City of Louisville, Ky.*, 245 U. S. 54, 58); and even though the legal title thereto be in a non-resident. (See Appellant's Brief, page 7, footnote 1.)

The question at issue here is, did the sons "own" so much of the trust fund as amounted in value to the value of the entire fund? If they did, the assessment is valid, and Virginia has not taxed to them property not owned by them and the tax is not in violation of Section 1, of the Fourteenth Amendment to the Constitution.

2. The Sons Owned the Fund

The tax is imposed by Virginia upon two of her residents on account of intangible personal property owned by them.

The highest Virginia Court has held that the deed of trust conferred on the two sons an absolute gift subject to be devested upon a condition-subsequent (R., p. 28).

The two sons took vested absolute estates in the personal property, with their enjoyment thereof postponed, such vested estates being subject to be devested upon the happening of either of the conditions subsequent. *Cropley* vs. *Cooper,* 19 Wall. 167, 177; *Carter* vs. *Keesling,* 130 Va. 655, 672.

There can be no question of the right of Virginia to tax such vested estates, and such other estates as the two sons have in the property. (Brief on behalf of Appellant, p. 11.)

It is argued, however, by Appellant that the aggregate value of the sons' interest is less than the value of the

fund, the difference being represented by (a) the interests of the unborn issue and (b) the interests of whatever persons take in the event of the death of both sons under twenty-five and without issue.

(a) *As to the Interests of the Unborn Issue*

The interests of the unborn issue of the sons are of no value. In the case of *Howbert* vs. *Cauthorn,* 100 Va. 649, Cauthorn sought, by an attachment suit, to subject the interests of Mary E. Howbert in realty to the payment of her bond held by him. The court held that the interest of Mary E. Howbert was a contingent remainder and could not be subjected to a sale.

The court said, at page 658:

> "* * * it follows, in the light of the foregoing authorities, that the appellant [Mary E. Howbert] has a contingent remainder in one moiety of the land mentioned, subject to be defeated by her death in the lifetime of Lucy Ann Thomas, when the interest would pass under the deed to others.
>
> "The second branch of the case involves the question whether or not such an unsubstantial and shadowy right as that held by the appellant can be subjected to sale for the benefit of her creditors. Such an interest is a pure contingency—a bare possibility whether it will ever exist or not. During the life of Lucy Ann Thomas such an interest hardly arises to the dignity of an estate. On the part of a purchaser, at a judicial sale, it would be a perfect

> hazard, for it could not be known to any one whether the supposed interest, being sold, would ever be of any value. It would be a mere speculative transaction and ruinous in its consequences, not only to the creditors, but to all parties interested."

Such a remainder was involved in *Young* vs. *Young*, 89 Va. 675, 678, and the Virginia court said:

> "At common law, it is true, a ***naked possibility***, such as this remainder, which was uncertain as to the person, could not be the subject of assignment or conveyance."

It is true that by statute in Virginia now, such an interest as was involved in either of these two cases may be disposed of by deed and even in the absence of statute, a deed of such interest might operate as an estoppel. But the *"naked possibility"* is not thereby given any value.

In the *Howbert* and *Young Cases, supra*, some of the remaindermen were *in esse*. Here the remaindermen are yet unborn (Appellant's Brief, p. 5). The interests of the unborn issue are thus dependent upon a double contingency—birth of issue, death of the issue's father under twenty-five—and are thereby reduced from a *"naked possibility"* to a *"strong improbability."*

Then, too, the assessment of a property tax is made upon the basis of the value of the property at a definite day in the past, not upon the value of the property in the future. On the dates that these assessments were made, the two sons were the owners of the absolute estate in

the personalty. They were both alive without issue and there was, therefore, no derogatory estate in any one else.

(b) *As to Interests of Those Taking in Event of Death of Sons Under Twenty-five, Without Issue*

The possibility of death of both sons under twenty-five, without issue, does not defeat the assessment. Should such event happen, the property would descend to the heirs of the one dying second, or pass under his will to his legatees. As to this contingency, the deed of trust is silent and there can be no estate in other persons by way of limitation upon such event, save by implication, and such limitations are not favored and the courts will incline against their creation either by devise or by deed, when the words employed are not clear and definite. *Brewster* vs. *McCall*, 15 Conn. 274, 291. In the absence of all reference to such an event, and when it was the intent of the grantor in the deed to give to the beneficiaries an absolute estate (R., p. 28), it should be held that the happening of the contingency (death of both sons under twenty-five without issue) does not affect the estate already created by the death of the first son, which estate is (1) an absolute estate in the then surviving son, or (2) a reversion in the grantor in the deed. Both (1) and (2) are represented by residents of Virginia (R., pp. 2, 28. Appellant's Brief, p. 5), and Virginia may therefore tax those interests and include such tax in the assessment made against the Trustee (R., pp. 3, 18, 29),

who is directed to pay all taxes chargeable on the property (R., p. 6).

3. Brooke Case Distinguished

The Special Court of Appeals of Virginia, in its exhaustive opinion herein by Crump, P. (R., p. 21), carefully considered and discussed *Brooke* vs. *Norfolk, 277* U. S. *27,* and (R., pp. 24, 28) held that this case was distinguished from the *Brooke Case* in that here the two sons were the owners of the property, as set out under 1 and 2, *supra,* while Mrs. Brooke had no interest in the property involved in that case.

C.—CONCLUSION

It is, therefore, asserted by the Appellee that such interests in the trust fund as may be in persons other than the two Kellam sons are of no value; that Virginia has imposed the taxes upon residents of Virginia on account of property owned by them and having a value equal to the assessment; that such assessment is valid and that the judgment of the Special Court of Appeals of Virginia should be affirmed.

W. W. Martin,

Henry R. Miller, Jr.,

Counsel for Appellee.

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CHARLES ELM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1929.

No. 20.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE, MARYLAND,

Appellant,

against

THE COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF OF RUSSELL L. BRADFORD AS AMICUS CURIAE AND ON BEHALF OF THE CITY BANK FARMERS TRUST COMPANY, OF NEW YORK, AS TRUSTEE.

RUSSELL L. BRADFORD,
Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1929.

No. 20

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE, MARYLAND,
Appellant,

against

THE COMMONWEALTH OF VIRGINIA,
Appellee.

ON APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF OF AMICUS CURIAE.

This brief by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amicus curiae,* and on behalf of the City Bank Farmers Trust Company of New York as Trustee of trusts made by residents of states other than the State of New York, the statutes of which, and the administrative rulings in connection therewith, are not wholly dissimilar from the Virginia statute and the decision of the Virginia Court in the case in suit.

This case presents the question of whether intangible personal property physically located in the State of Maryland and standing in the name of, and owned by, a Baltimore, Maryland, trust company as trustee, is subject to the *ad valorem* personal property taxes of the State of Virginia if the *cestuis* be residents of Virginia.

The relevant facts are set out in the brief of counsel for appellants as well as in the opinion of the Special Court of Appeals of Virginia (R., 21). The argument of this brief in support of the appellant's contentions that the trust funds in suit are not subject to the Virginia *ad valorem* personal property tax will be addressed to the following points in the following order:

I. An *ad valorem* personal property tax may not be imposed upon intangibles held outside of the state by a non-resident trustee upon an irrevocable trust.

II. The *cestuis* in the case in suit are not the owners of the intangibles composing the *corpus* of the trust nor of the trust *res*.

III. *Brooke* v. *City of Norfolk* should be controlling. There is no more property in the State of Virginia in this case than there was in that case.

POINT I.

An ad valorem personal property tax may not be imposed upon intangibles held outside of the state by a non-resident trustee upon an irrevocable trust.

Intangibles may be subjected to an *ad valorem* personal property tax at the domicile of the owner under the rule of *mobilia sequuntur personam* (*Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558 (1879); *Fidelity etc. Co.* v. *Louisville*, 245 U. S. 54, 62 L. Ed. 145 (1917); *Guthrie* v. *Pittsburgh etc. Ry. Co.*, 158 Pa. St. 433 (1893)). They also may be taxed by the state of the owner for inheritance or death duty purposes. (*Frick* v. *Pennsylvania*, 268 U. S. 473, 79 L. Ed. 1058 (1925); *Blodgett* v. *Silberman*, 277 U. S. 1, 72 L. Ed. 749 (1928); see also *Bullen* v. *Wisconsin*, 240 U. S. 625, 60 L. Ed. 831 (1916)). This is true whether the intangibles be with the owner or by his voluntary act have a separate *situs* (*ibid*).

Intangibles may be subject to tax where they are physically located if they have by act of the owner obtained a separate *situs*. The rule that "movables follow the owner" yields to the fact of presence and location. "The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual *control* elsewhere." (*Liverpool etc. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346 at p. 354, 55 L. Ed. 762 (1911)). This proposition has been upheld by this Court in a long line of decisions commencing with *New Orleans* v. *Stempel*, 175 U. S. 309, 44 L. Ed. 174 (1899), continuing with *Bristol* v. *Washington Co.*, 177 U. S. 133, 44 L. Ed. 701 (1900); *State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388, 48 L. Ed. 232 (1903); *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 51 L. Ed. 853 (1907), and through to *Liverpool etc. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 55 L. Ed. 762 (1911).

The above cases present a variety of circumstances in which this Court has had for decision the taxable *situs* of intangibles which were located elsewhere than at the domicile of the owner. It may be interesting to note, though superfluous to point out, that in each of these cases the intangibles had obtained a separate *situs* of their own by and through the voluntary act or conduct of the owner.

The doctrine as laid down in the above cases in respect of *ad valorem* personal property taxes is true also of inheritance taxes. (*Blackstone* v. *Miller*, 188 U. S. 189, 47 L. Ed. 439 (1903); *Wheeler* v. *Sohmer*, 233 U. S. 434, 58 L. Ed. 1030 (1914).

Tangible personalty, like real estate, may be subjected to tax only where it is located. The former doctrine that "all movables follow the owner" for purposes of taxation has thus completely yielded to the fact of presence and is no longer applicable in respect of tangible personalty either with regard to *ad valorem* personal property taxes or death duties. (*Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 50 L. Ed. 150 (1905)—as

to property taxes—and *Frick* v. *Pennsylvania*, 268 U. S. 473, 79 L. Ed. 1058 (1925) as to death duties).

The *ratio decidendi* of these cases is that the taxing state must have jurisdiction of the taxable subject. The taxable subject, if it be intangibles, must be within the jurisdiction of the state, either by virtue of actual presence or if incorporeal such as credits on open account then by reason of "actual control", or by virtue of the application of the maxim *mobilia sequuntur personam*. The owner may not be taxed upon property owned by him unless the property taxed is within the taxing jurisdiction either actually or by some accepted fiction of law. (See *Union Refrigerator Co.* v. *Kentucky*, supra, and cases above cited.)

If the above propositions of law are applied to the facts in this suit they bring us to the following conclusions:

(1) The trust *res*, or the securities comprising the trust *corpus*, are not physically within the State of Virginia and may not be taxed by virtue of the actuality of *situs* or the control of the State over them.

(2) The doctrine *mobilia sequuntur personam* may not be applied to the trust *res* unless (a) the *cestuis* in the case in suit are in fact and in law the owners of the full trust *res* and (b) the trust *res* is without the state by their voluntary discretionary act. (*Brooke* v. *City of Norfolk*, 277 U. S. 27 (1928)—in respect of property taxes; *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567, 575, 71 L. Ed. 413 (1926)—in respect of inheritance taxes or death duties).

In the *Wachovia* case this Court said (at p. 575):

> "We think the assets of the trust estate established by the Will of Haynes had no *situs*, actual or constructive, in North Carolina. * * * A state may not subject to taxation things wholly beyond her jurisdiction or control. *Frick* v. *Pennsylvania*, 268 U. S. 473."

The property composing the trust fund or the trust *res,* even assuming—an assumption which hereafter will be proven to the contrary—the *cestuis* were the owners, could not be brought into the State of Virginia by any act of the *cestuis.* The corpus of the trust is wholly beyond their control, is not in their possession, and they may not bring the same into the State of Virginia even if they wanted to. In *Brooke* v. *City of Norfolk,* supra, at p. 29, this Court said:

> "But here the property is not within the State, does not belong to the petitioner and is not within her possession or control."

Similarly it may be said in respect of the Kellam trust in suit that the property is not within the State, does not belong to the *cestuis* and is not within their possession or control. Yet in the *Brooke* case Mrs. Brooke could have disposed of her life interest by assignment or by sale at a reasonable proportion of the value of her life interest. In addition she had the actual enjoyment of the property in that she received the full usufruct. In the case in suit until the *cestuis* become twenty-five years of age they not only may have no enjoyment of the property, but it is doubtful whether they could dispose of the same by sale at any sum reasonably commensurate with the value attributed to the property for the purposes of the Virginia tax, if, indeed, at any price.

The tax imposed under Section 2307 of the Virginia Code as amended was upon the intangibles composing the trust *corpus.* The intangibles were not in Virginia. That fact eliminates one basis of assessment. Were the intangibles assumed to be in Virginia that is, constructively there, by virtue of the presence in Virginia of the *cestui* under the doctrine *mobilia sequuntur personam?* That brings us to a discussion of the second point or inquiry.

POINT II.

The cestuis in the case in suit are not the owners of the intangibles composing the corpus of the trust nor of the trust res.

We have seen that the intangibles were not actually in Virginia nor under the "actual control" of that State, therefore to be taxable they must have been constructively there by reason of the domicile of the legal owner. Was there a Virginia owner?

The Special Court of Appeals of Virginia (145 S. E. at p. 330) took the position that unless the two sons, that is, the *cestuis,* and the personal representatives of the grantor of the trust, are the owners of the trust fund, the fund is without ownership. It therefore concludes, a *non sequitur,* that "no non-residents are owners or have any interest in the *corpus* of the trust fund in Baltimore; that the present, and, if essential, the ultimate owners of the property, are residents of the State of Virginia; that the assessment in this case does not require any persons to pay a tax upon intangible personal property to which they are strangers." It is obvious, or should be, that the *cestuis* are not the full owners of the trust fund. It is equally obvious that the mere possibility of reverter in the estate of the grantor does not constitute a full ownership. Nor, as the brief of counsel for the appellant points out, does the alleged ownership in the *cestuis* and the Kellam estate taken separately or together constitute the totality of ownership. They "fall short of being commensurate with the entire interest that has been taxed." It is quite conceivable that either of the two children could, prior to reaching the age of twenty-five years, die leaving issue living outside of the State of Virginia. The unborn issue may not be ignored in considering the totality of ownership.

But neither the *cestuis* nor the Kellam estate is the legal owner of the property sought to be subjected to tax. There was a valid suspension of the power of alienation

and during that period the full dominion over, legal title to, and ownership of the property is in the trustee. It and it alone could be taxed upon the property, and could be taxed only by the taxing jurisdictions having control over it or the property it owned. If the trustee places and keeps the securities outside of the State of Maryland, they nevertheless would be subject to the Maryland personal property tax because of the ownership of the trustee, under the doctrine of *Kirtland* v. *Hotchkiss*, 100 U. S. 491. (See also *Guthrie* v. *Pittsburgh etc. Ry. Co.*, 158 Pa. St. 433).

It is true that while there are certain equitable rights appertaining to the *cestuis*, nevertheless they are not the legal owners of the property and may never be. Similarly this is true of the estate of L. J. Kellam, the deceased grantor. In *Maguire* v. *Trefry*, 253 U. S. 12, this Court in upholding the right of the State of Massachusetts to impose a tax upon income received by a resident thereof from property held in trust without the State of Massachusetts, said at p. 16:—

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. 'The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits or benefits thereof in his hands, belong wholly, or in part, to others.' 2 Story's Eq. 11th Ed. Sec. 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject matter of the tax under the statute of Massachusetts."

It was there recognized that the legal title and ownership of the property was in Pennsylvania. Also in that case, as the Supreme Judicial Court of Massachusetts said, and which was quoted with approval at p. 14 by this Court, the income tax of Massachusetts affected

> "only the income after it has been paid by the trustee to the beneficiary."

It was therefore a tax upon the income after it had been made available to the resident of Massachusetts and thus was capable of being brought into the State of Massachusetts by the voluntary act of the resident. The Massachusetts resident then became the owner of the income.

The Massachusetts Court also said, quoting from *Bates* v. *Boston*, 5 Cush. 93, at p. 99:—

> "The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability."

In *Guthrie* v. *Pittsburgh etc. Ry. Co.*, 158 Pa. St. 433 the Supreme Court of Pennsylvania upheld a personal property tax upon intangibles owned by a Pennsylvania testamentary trustee under a will probated in the District of Columbia, and which intangibles the trustee had allowed to remain in the District of Columbia. The tax was upheld upon the ground that the trustee was the owner of the property, and the intangibles thus had a taxable *situs* at the domicile of the owner. The Court said (at p. 438):—

> "It certainly seems well settled that the *situs* of such property for the purpose of taxation is in that state where the trustee *in whom is vested the legal title and ownership is domiciled.*" (Italics ours).

In the case in suit at the time of the assessment the income, profits and benefits of the trust fund were not and could not be enjoyed by the *cestuis* or any other person living in the State of Virginia. The property was legally and wholly owned for the time being by the nonresident Baltimore trustee. Held, it is true for the ultimate benefit of as yet unascertained remaindermen, or for unborn issue who may or may not ever be residents

of the State of Virginia, but nevertheless owned by the trustee. All the income, profits or benefits of the trust fund were to be held and retained by the trustee to be ultimately distributed in accordance with the provisions of the trust instrument. Every element of ownership inhered in the trustee in Baltimore, subject to its duty to turn over the principal and the income to those designated to be the ultimate owners of the trust *res* when they shall have been ascertained or become known in accordance with the terms of the trust agreement.

The trustee was liable to taxation in the State of Maryland and the record shows that it paid a tax to the State of Maryland as the owner of property located therein. The trustee alone was subject to the payment of the Federal income taxes upon the income from, or upon any realized accretions to, the principal of the trust fund. So far as the status of the trust *res* was concerned during the period covered by the taxes imposed in suit, no income nor benefits of the trust fund belonged to or could have been enjoyed by any person then definitely known as the ultimate owner of the property living in Virginia.

It is submitted there was no ownership at all of the intangibles composing the trust property, nor of the trust *res,* by anyone within the jurisdicition of the State of Virginia. It is submitted *a fortiori,* even assuming ownership—which is denied—in the *cestuis* and in the estate of the grantor, nevertheless that ownership falls short of being the ownership of the total, which the State of Virginia under the provisions of Section 2307 of the Code as amended has sought to tax.

These cestuis may not will away this property as the life beneficiary and donee of the power in the property might have done and did in the case of *Wachovia Bank & Trust Co.* v. *Doughton, supra.* These *cestuis* may not dispose of the property nor even of such interest as they have, if any, with the expectation of realizing any substantial sum as the beneficiary in *Brooke* v. *City of Nor-*

folk, supra, may have done in respect of her life estate. The right or claim that the *cestuis* have is that only of a conditional interest (call it a vested interest subject to being divested or not) and this interest is of so uncertain and attenuated a nature as to repel a fictional hypothesis of total and complete ownership.

But even assuming there was some property interest in residents of Virginia, was it the ownership sought to be taxed by the Virginia statute, and was it an ownership of the trust *res* as an entity, or the ownership of the intangibles composing the trust fund? Clearly not the latter. But it is the intangibles or the trust *corpus* that is subjected to the tax, not the value, if there be any, of the inchoate expectancy, or of the contingent interest of the Virginia *cestuis.* It fairly may be said there was no more ownership of the property of this trust fund, if as much, by Virginia residents than there was ownership by a Virginia resident of the property in the case of *Brooke* v. *City of Norfolk.*

POINT III.

Brooke v. City of Norfolk should be controlling. There is no more property in the State of Virginia in this case than there was in that case.

There is no real and substantial difference between the case in suit and the case of *Brooke* v. *City of Norfolk.* The point of law is practically identical. The cases differ only in that in the *Brooke* case the actual items of property comprising the trust *corpus* were never in the State of Virginia while in the trust here in suit the items originally composing the *corpus* of the trust fund (they may have been since changed) were at one time in the State of Virginia.

We take it for granted that the *Brooke* case may not be differentiated from the case in suit merely upon the ground that the origin of the trust property in the case in suit was in the taxing state, whereas in the *Brooke* case the property originated in the state wherein the securities were held by the trustee. Quite obviously this slight and inconsequential variation in the facts does not differentiate the question of law presented nor the point decided in the *Brooke* case. The mere fact that a man removes property from one state to another, even though it be done for the purpose of minimizing taxes, does not render the property subject to tax at its former location. If it be tangible property that he has sent out of the state the law is definite that the state of his domicile may not impose a tax upon it or him because of his ownership. (*Union Refrigerator Transit Co.* v. *Kentucky, supra,* and *cf. Buck* v. *Beach,* 206 U. S. 392, 51 L. Ed. 1106) This is likewise true of intangibles if he cease to be the owner thereof. During the years of the tax in suit the intangibles were not in the State of Virginia regardless of where they may have been before. No jurisdiction exists to tax by reason solely of the former habitat of the securities. If the ownership be retained, then the tax may not be avoided by removing the intangibles. But if the ownership be changed and the intangibles be without the state, the mere fact that they formerly had been within the state does not render them amenable to the taxing law.

The two cases differ superficially also in that in the *Brooke* case the beneficiary had only a life interest and would never be entitled to any part of the corpus of the trust, though she did have a right of sale (we have assumed the *Brooke* trust not to be a spendthrift trust) of the interest owned by her, that is to say, her life estate, whereas in the trust in suit upon the happening of certain contingencies the two sons of the grantor of the trust

now resident in Virginia may become the owners of the *corpus*. On the other hand they could not in any practical commercial sense dispose of that interest. Like the beneficiary in the *Brooke* case they have no testamentary power over the trust property.

In the *Brooke* case this Court said "the property is not within the State * * *". This Court there must have meant either the items or securities composing the *corpus* of the trust fund were not within the state or the actual trust *res* was not within the State. It could not have meant that Mrs. Brooke did not own a property right of some sort, for there was within the state a right in Mrs. Brooke to the income, which capitalized over the period of her life expectancy might have been held to be a credit or a right of property in that such credit or right had its *situs* with her. But this Court necessarily had in mind not that claim or right to the income as and when earned but the actual trust *res* or the trust property, for that is what the statute taxed. If the *corpus* of the trust had been real property located in Maryland Mrs. Brooke would have had the same right to the income, and when it became income would have been liable nevertheless to tax upon it by Virginia. But the real estate *corpus* could not have been taxed. Mrs. Brooke was taxed upon the whole of the *corpus* consisting of intangibles. She did not own the whole. This Court says she owned none of it. Therefore, this Court held the tax upon the trust fund in the *Brooke* case invalid.

In the case in suit, applying the doctrine laid down in the *Brooke* case, neither the trust *res* nor any of the intangibles comprising the trust *corpus* are "within the state" any more than it would have been if it consisted of real property. The children of the grantor in the case in suit have in fact and in law less property and less property rights than Mrs. Brooke had under the trust there in suit. She had a substantially real thing that belonged to her during the whole of the period of her life. But she did not own any of the *corpus* of the trust, which

was the subject of the tax. In the Kellam trust the two children now own nothing of practical or substantial value. They do not even enjoy the income from the property of which they are the alleged owners. They may never be the owners of either the principal or the income. When they do become the actual owners thereof, if ever, they may not be then residents of Virginia. Their interest is a less interest for all practical purposes than that of Mrs. Brooke. They have a mere expectancy to property and not an ownership in property.

That no taxable subject exists in Virginia upon which the tax may fasten as held in the *Brooke* case, is reenforced and fortified by the decision of this Court in *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567, 575.

In this case a trust had been created in the State of Massachusetts with a Massachusetts trustee by a resident thereof for the benefit of his daughter who subsequently married and moved to North Carolina. She was the full life beneficiary of the trust fund and received all of the income, profits and benefits of the said trust fund during the period of her life. In addition to that she had a general power of appointment by will over the full *corpus* of the trust. She had a thing of actual value in the trust property. Her life estate was saleable. She could have disposed of the *corpus* by will in any way she saw fit. It is true that under the law of powers obtaining in Massachusetts the appointee takes from the donor and not the donee. Nevertheless, the daughter, Theodosia Taylor, could exercise over that property and enjoy many more of the attributes of ownership than the children in the Kellam trust. This Court held that the State of North Carolina under a statute imposing a transfer inheritance tax upon the exercise of powers of appointment could not reach this property which was situated in Massachusetts, and the Court concludes its opinion in that case at p. 575 with the statement that

> "We think the assets of the trust estate established by the will of Haynes had no *situs,* actual or constructive, in North Carolina."

To what assets does the statement of the Court apply? Not to the power, not to the right of disposition by will of the *corpus* of the trust that was owned by the North Carolina resident, but to the *actual intangible assets* that comprised the *corpus* of the trust. They and they alone were the tax subjects. If they were in the State of North Carolina, either physically or by virtue of the ownership thereof in the donee of the power, then the North Carolina tax properly could have been imposed. If they were without the state and she were not the absolute owner thereof, then the tax was a violation of the Fourteenth Amendment to the Constitution of the United States as this Court held and as it said in closing its opinion in that case:

> "A state may not subject to taxation things wholly beyond her jurisdiction or control." *Frick* v. *Pennsylvania,* 268 U. S. 473.

In the *Brooke* case, in the *Wachovia* case, and in the present case of the *Safe Deposit & Trust Co. of Baltimore,* no accounting may be compelled by or in any court of the taxing state,—in this case the State of Virginia. In none of the three cases has the beneficiary or *cestui* any power of control or right in respect of the management and administration of the trust property. In none of the cases did the title stand in the name of the *cestuis* or the beneficiary. In all of the cases the inevitable *ratio decidendi* is that the actual owner of the property was the trustee in whose name the intangibles stood.

It may be observed also that in each of these cases the retention of the intangibles outside of the territorial jurisdiction of the taxing state was beyond the control or discretion, and even despite the possible wishes, of the

beneficiaries and/or *cestuis*. On the other hand, as heretofore pointed out, in every case running from *New Orleans* v. *Stempel* through *Liverpool Insurance Company*, and including the inheritance tax cases of *Bullen* v. *Wisconsin*, *Frick* v. *Pennsylvania*, and *Blodgett* v. *Silberman*, the tax when imposed because of the *situs* of the intangibles was imposed upon intangibles that had obtained a separate *situs* by the *voluntary* act of the actual owners of the property, or because the taxing state had control of the subject taxed.

We think it may be said, and submit that it lies at the root of the law in respect of the *situs* of intangibles, that if the intangibles be with the owner at his place of domicile they may be taxed only at his place of domocile or by the state having control of the property, as in the case of corporate stocks. If the intangibles by the exercise of the voluntary free will of the owner are placed and kept in a jurisdiction other than that of his domicile, then they may be taxed either at their physical location or at the domicile of the owner or both. (See cases cited above). But even assuming, which is not the fact here, the ownership of the intangibles, they nevertheless may not be taxed at the domicile of the owner if it be beyond the power of the owner to bring them to his domicile or they be beyond the control of the taxing state. They have under such circumstances a *situs* as separate and distinct from his as the *situs* of real property or tangible personal property. It may not be said, as we construe the decisions, that intangibles are and must be held to have a constructive *situs* with the reputed owner if they are not and by his act may not be with him at his domicile.

In view of the decisions that the rule that "movables follow the owner" yields to fact, to convenience, and to justice, and in view of the modern uses of intangible property and the exchange and transfer of the same with the same facility that money may be used, the question

of the *situs* of intangibles for purposes of taxation has not been altogether free from perplexity and at times confusion. The law in respect of real estate has always been settled. In respect of tangible personalty the proper *situs* thereof has now been settled both for property taxes (*Union Refrigerator Transit Co.* v. *Kentucky*) and for inheritance taxes (*Frick* v. *Pennsylvania*). The rule as to intangibles is, we submit, equally definitely settled, though intangibles may be open to double taxation.

The rule as we adduce it from the decisions of this Court is, as we have heretofore stated, that *ad valorem* personal property taxes and inheritance taxes may be imposed by the State of the domicile of the owner if the intangibles be with the owner, and even if the intangibles be separated from the owner, if separated by his act or treatment of them. Intangibles may be taxed where they are employed in business or where they are physically present, regardless of the domicile of the owner if the owner's act or conduct has given to them a *situs* separate from that of his domicile. They also may be taxed regardless of the domicile of the owner by the state having jurisdictional control over the subject taxed. But constitutionally a state may not tax intangibles not employed or located therein, unless that state has control of the subject matter of the tax, or the intangibles are deemed to be within the State by virtue of the presence of the owner who has *voluntarily* placed and kept them without the state.

We therefore respectfully submit that so long as the Safe Deposit and Trust Company of Baltimore acts as trustee and retains and keeps in its possession in Baltimore the intangibles composing the *corpus* of this trust fund under the circumstances and facts of this case, these intangibles are subject to tax only by the State of Maryland. A tax sought to be imposed by any other taxing jurisdiction is in violation of the "due process of law"

clause of the Fourteenth Amendment of the Constitution of the United States.

POINT IV.

The decision of the Special Court of Appeals should be reversed.

Respectfully submitted,

RUSSELL L. BRADFORD,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1929.

Safe Deposit and Trust Company of Baltimore, Maryland, Appellant,
vs.
The Commonwealth of Virginia.

Appeal from the Special Court of Appeals of the State of Virginia.

[November 25, 1929.]

Mr. Justice McReynolds delivered the opinion of the Court.

This cause is properly here upon appeal. The petition for certiorari is therefore denied.

May 4th, 1920, Lucius J. Kellam, then domiciled and residing in Accomac County, Virginia, transferred and delivered to the Safe Deposit and Trust Company of Baltimore, Maryland, stocks and bonds of sundry corporations valued at fifty thousand dollars, with power to change the investments, upon the following terms—

> • • • to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be

paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held.

The deed made no provision for the event of death of both sons under twenty-five without issue. The donor reserved to himself power of revocation, but without exercising it, died in 1920. Administration on his estate was had in Accomac County, Virginia, and his two sons are domiciled there.

Except as changed by reinvestment, the Trust Company has continued to hold the original securities in Baltimore, Maryland, and has paid the taxes regularly demanded by that City and State on account of them.

An assessment for taxation in Accomac County, Virginia, for the years 1921, 1922, 1923, 1924 and 1925 upon the whole corpus of the trust estate was sustained by the court below—the highest State tribunal to which the matter could be submitted. It declared Sec. 2307, Virginia Code (1919), as amended in 1920, 1922 and 1923* applicable, adequate to support the demand and not in conflict with the Fourteenth Amendment.

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*Sec. 2307, Va. Code 1919 (as amended). *By whom property is to be listed; to whom taxed.*—If property be owned by a person *sui juris*, it shall be listed by and taxed to him. If property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee it shall be listed by and taxed to his father, if any he has; he has no father, then it shall be listed by and taxed to his mother, if any he has; and if he has no guardian, nor trustee, father nor mother, it shall be listed by and taxed to the person in possession. If the property is the separate property of a person over twenty-one years of age or a married woman, it shall be listed by and taxed to the trustee, if any they have in this State; and if they have no trustee in this State, it shall be listed by and taxed to themselves. In either case, it shall be listed and taxed in the county or city where they reside; but if they be non-residents of Virginia, the property shall be listed and taxed in the county or city wherein such trustee resides. If the property be the estate of a deceased person, it shall be listed by the personal representative or person in possession, and taxed to the estate of such deceased person. If the property be owned by an idiot or lunatic, it shall be listed by and taxed to his committee, if any; if none has been appointed, then such property shall be listed by and taxed to the person in possession. If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county or city of his residence (except as hereinbefore provided).

Appellant maintains that so interpreted and applied the statute lays a tax upon property wholly beyond the jurisdiction of the State and consequently offends the Fourteenth Amendment.

Manifestly, the securities are subject to taxation in Maryland where they are in the actual possession of the Trust Company—holder of the legal title. That they are property within Maryland is not questioned. *De Ganay* v. *Lederer*, 250 U. S. 376, 382. Also, nobody within Virginia has present right to their control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders. They have no legal situs for taxation in Virginia unless the legal fiction *mobilia sequuntur personam* is applicable and controlling. The court below, recognizing this, held the two sons, in conjunction with the administrator of the father's estate—all domiciled in Virginia—really owned the fund and that by reason of the fiction its taxable situs followed them.

We need not make any nice inquiry concerning the ultimate or equitable ownership of the securities or the exact nature of the interest held by the sons. In the disclosed circumstances, we think that is not a matter of controlling importance.

Ordinarily this Court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett* v. *Silberman*, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation, or otherwise. *State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388, 404; *Buck* v. *Beach*, 206 U. S. 392, 408. *Liverpool, etc. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 354; *Maguire* v. *Trefry*, 253 U. S. 12, 17. Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and cannot be changed by the *cestuis que trust.*

The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire* v. *Trefry, supra.*

A statute of a State which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 204; *Buck* v. *Beach,* 206 U. S. 392, 402, 408, 409; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Wachovia Bank & Trust Co.* v. *Doughton,* 272 U. S. 567, 575.

Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place. *Union Refrig. Transit Co.* v. *Kentucky, supra; Frick* v. *Pennsylvania, supra.* Intangible personal property may acquire a taxable situs where permanently located, employed and protected. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *State Board of Assessors* v. *Comptoir National d'Escompte,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool, etc. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346.

Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another state. We think not. The reasons which led this Court in *Union Refrig. Transit Co.* v. *Kentucky,* 199 U. S. 194, and *Frick* v. *Pennsylvania,* 268 U. S. 473, to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would "involve possibilities of an extremely serious character" by permitting double taxation, both unjust and oppressive. And the fiction of *mobilia sequuntur personam* "was intended for convenience, and not to be controlling where justice does not demand it."

No opinion of this Court seems definitely to rule the exact point now presented. *Blackstone* v. *Miller,* 188 U. S. 189, sustained an assessment of tax by New York upon the transfer of credits, declared to have taxable situs within her borders, under the will of a citizen of Illinois. In *Wheeler* v. *Sohmer,* 233 U. S. 434, the tax

was not laid at the owner's domicile, but by the State wherein the securities were deposited. *Bullen* v. *Wisconsin*, 240 U. S. 625, involved an inheritance tax; the creator of the trust resided in Wisconsin at his death and an Illinois Company with legal title then held possession of the property in Chicago; but the creator had retained full power to revoke the trust and regain control. *Fidelity, etc. Co.* v. *Louisville*, 245 U. S. 54, sustained a tax laid at the domicile of the legal owner. He had full power to control the deposits in St. Louis banks and might have brought the entire fund within Kentucky's jurisdiction. In *Blodgett* v. *Silberman*, 277 U. S. 1, the decedent—a resident of Connecticut—had control and present right to all benefits arising from the property. The legal title was not held by another with the duty to retain possession, as in the present cause. Moreover, this Court did not there determine that the property had a taxable situs in New York.

Any general statement in the above opinions which may seem to interfere with the conclusion here announced must be limited and confined to the precise situation then under consideration.

It would be unfortunate, perhaps amazing if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment.

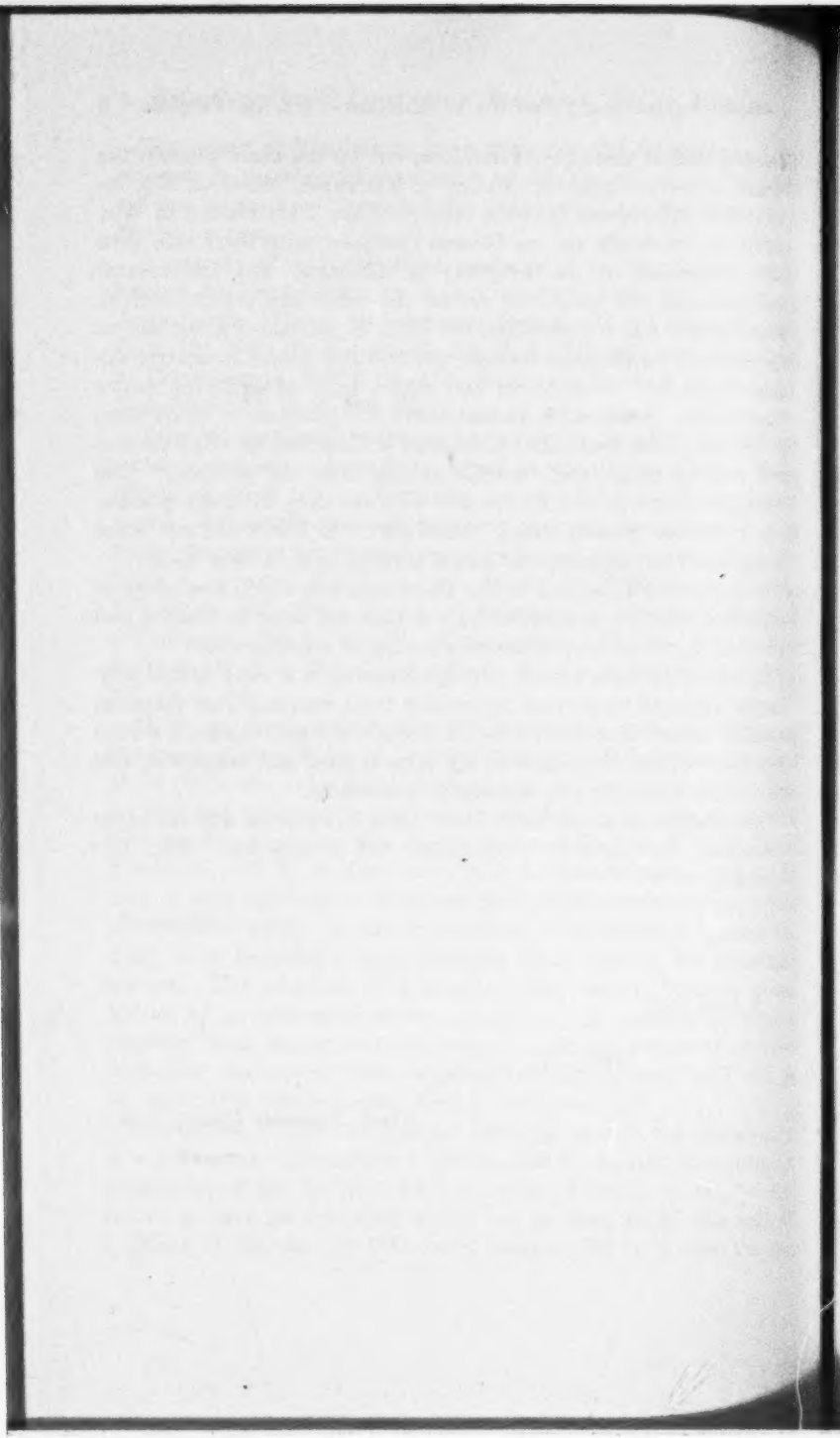
The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1929.

Safe Deposit and Trust Company of Baltimore, Maryland, Appellant, *vs.* The Commonwealth of Virginia. } Appeal from the Special Court of Appeals of the State of Virginia.

[November 25, 1929.]

Concurring opinion of Mr. Justice Stone.

I concur in the result. It is enough to support it that, as stipulated in the record, the Virginia assessment was levied against a trustee domiciled in Maryland upon securities held by it in trust in its exclusive possession and control there, and so is forbidden as an attempt to tax property without the jurisdiction. *Brook* v. *Norfolk*, 277 U. S. 27. But the question whether the Fourteenth Amendment forbids a tax on the beneficiaries, in Virginia, where they are domiciled, measured by their equitable interests, seems to me not to be presented by the record and so, under the settled rule of decision of this Court, ought not now to be decided. *Burton* v. *United States*, 196 U. S. 283, 296; *Blair* v. *United States*, 250 U. S. 273, 279; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *Light* v. *United States*, 220 U. S. 523, 538.

No attempt was made by Virginia to tax the equitable interests of the beneficiaries of the trust. That the thing taxed or the measure of the tax is different from the equitable interests of the beneficiaries, as affected by the specified contingencies, sufficiently appears from the fact that the one may well have been of different value than the other. In fact, the securities seem to have been assessed at their full value, although the equitable interests of the beneficiaries are less than the whole.

It may be that Virginia, following its own view of the nature of vested and contingent interests, might tax the interests of these beneficiaries as though they were the whole, but it is sufficient for present purposes that it has not assumed to do so. In the face of

the present record we are not required to speculate how far a tax, forbidden because assessed upon property beyond the jurisdiction, may be upheld because it may be passed on to the beneficiaries in Virginia and the equitable interests thus reached by indirection.

If the question were here I would not be prepared to go so far as to say that the equitable rights *in personam* of the beneficiaries of the trust might not have been taxed at the place of their domicile quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs. In neither case, if the threat of double taxation were controlling, which under the decisions it is not, *Fidelity & Columbia Tr. Co.* v. *Louisville*, 245 U. S. 54, 58; *Cream of Wheat Co.* v. *Grand Forks Co.*, 253 U. S. 325, 330; *Citizens Nat'l. Bank* v. *Durr*, 257 U. S. 99, 109; cf. *Swiss Oil Corporation* v. *Shanks*, 273 U. S. 407, 413, would it seem that in any real sense is there double taxation, since the legal interests protected and taxed by the two taxing jurisdictions are different.

Mr. Justice BRANDEIS concurs in this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1929.

Safe Deposit and Trust Company of Baltimore, Maryland, Appellant,
vs.
The Commonwealth of Virginia.

Appeal from the Special Court of Appeals of the State of Virginia.

[November 25, 1929.]

Mr. Justice Holmes.

The Special Court of Appeals was plainly right in holding that the deed of trust conferred an absolute gift upon the two beneficiaries, perhaps, though I doubt it, subject to be divested upon a condition subsequent. Gray, Perpetuities, 1st ed., § 108. If the beneficiaries could be taxed at all they could be taxed for the whole value of the property, because the whole title was in them, even if liable to be divested at some future time in a not very probable event.

I am of opinion that on principle they can be taxed. In the first place I do not think that it matters that the owners, residing in Virginia, have only an equitable title. To be sure the trustee having the legal title and possession of the bonds in Maryland may be taxed there. But that does not affect the right of Virginia by reason of anything that I know of in the Constitution of the United States. *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592. *Kidd* v. *Alabama*, 188 U. S. 730, 732, 733. *Hawley* v. *Malden*, 232 U. S. 1, 13. *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, 330. *Citizens National Bank* v. *Durr*, 257 U. S. 99, 109. *Blodgett* v. *Silberman*, 277 U. S. 1, 10. Compare with the last case *Wheeler* v. *Sohmer*, 333 U. S. 434.

I see no other fact to cut down Virginia's power. It is true that the conception of domicil has been applied to tangible personal property and it now is established that a State cannot tax the owner of such property if it is permanently situated in another State. But hitherto the decisions have been confined to tangibles that in a plain and obvious way owed their protection to another

power. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 206. It seemed to me going pretty far to discover even that limitation in the Fourteenth Amendment. It opens vistas to extend the restriction to stocks and bonds in a way that I cannot reconcile with *Blodgett* v. *Silberman*, 277 U. S. 1. Taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact. *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, 58. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, —. The notion that the property must be within the jurisdiction puts the emphasis on the wrong thing. The owner may be taxed for it although it never has been within the State. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63. It seems to me going still further astray to rely upon the *situs* of the debt. A debt is a legal relation between two parties and, if we think of facts, is situated at least as much with the debtor against whom the obligation must be enforced as it is with the creditor. To say that a debt has a *situs* with the creditor is merely to clothe a foregone conclusion with a fiction. The place of the property is not material except where inability to protect carries with it inability to tax. But that is an exceptional consequence. One State may tax the owner of bonds of another State, although it certainly contributes nothing to their validity. *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592. It is admitted that Maryland could tax the trustee in this case although most at least of the securities handed over were beyond the power of Maryland to affect in any substantial way. The equitable owners of the fund were in Virginia and I think they could be taxed for it there. I do not understand that any merely technical question is raised on the naming of the trustee instead of the *cestuis que trust* as the party taxed. Nor is there any question of the amount. Throughout the record, by the Court and by the trustee, the single issue is stated to be whether the fund can be reached. In the words of the trustee it is: "Has such corpus, so created and held, a taxable situs in Virginia within the sanction of section one of the 14th Amendment to the Constitution of the United States?" I think the judgment should be affirmed.